- Our success in this world and hereafter lies in following the Islamic Shariat
- All the instructions specified in the Islamic Shariat are rational and judicious
- Teachings of the Quran and Sunnah are in accordance with the human nature

To spread this truth among Muslim and non-Muslim jurists and intellectuals, the All India Muslim Personal Law Board has formed

Tafheem-e-Shariat Committee

Join us in our movement! We all will create awareness among people about the Islamic Law and will eradicate the misconceptions about this Law

THE MUSLIM PERSONAL LAW

AND

MISUNDERSTANDINGS

Moulana Khalid Saifullah Rehmani

Co-Author and Translator

Dr. Quddusa Sultana

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FOREWORD

All praise is for the Lord of the worlds, Peace be upon Prophet Mohammad, his companions and the followers.

Different regions of the world differ in their laws. People, who follow the laws, believe them to be the base of the life. People from other religions follow their personal laws, which are based on their culture and customs. In Islam the source of the law is the divine revelation. Where as in other religions, rules and regulations are drafted based on the habits and customs that are adopted since long period. Hence, they can be amended and modified to compensate with the changes in their culture. But the same is not true for Islam. As the Islamic laws are divine, it is not possible for human beings to modify them according to their will and wish. Any change in the Islamic law means the change in the basic structure of the divine religion.

The Islamic personal law covers several instructions related to the personal and marital issues of a person. For a Muslim, accepting this law is the base of his faith. Refusal or modification in the Islamic law implies rejection of the faith. Hence, Muslims cannot amend or modify this law to compensate the advances in the culture or customs, as the law is applicable for all types of situations. Further, the Islamic law is defined by the God based on the requirements and necessities of mankind. Since, the God, the creator is aware of all the weaknesses and nature of a man he knows how to formulate the laws that are most suitable for him. It is not within the capacity of a man to draft the laws for mankind.

Moulana Khalid Saifullah Rehmani Sahab, (Secretary and Convenor, Tafheem-e-Shariat Committee , All India Muslim

Personal Law Board),member and even the chair person for many Islamic schools, is a well-known knowledgeable personality of India, well versed in the Islamic law, interprets the wisdom behind divine laws in an excellent manner. He has written articles on the misunderstandings about the Muslim personal law in a very appealing, obvious and appreciable manner. This book is a compilation of the articles written by him. Reader can understand the significance and specialty of the Islamic law. This book is expected to be highly beneficial for the cause.

It is our delight that a learned Muslim sister from Hyderabad, Dr.Quddusa Sultana (Ph.D. Research Supervisor, Department of Electronics and Communication Engineering, Osmania University, Hyderabad) has translated the first edition of the book into English. Further, she has extended the first edition of the book as a co-author by adding relevant statistics and explanation to shape 2nd edition. Presently, the 2nd edition of the book is before the reader. May God reward her with the best! Hope the English version of the book with relevant statistics may enhance the benefits of the book to higher horizons.

Mohammed Rabay Hassan Nadvi — 15 Rabi-as-Sani, 1436H

Nadvatul-Ulema, Lucknow, India — 6th February, 2015

PREFACE

Implementing family laws of Islam in our daily life is as important as offering Salah (prayer), fasting during Ramadhan, performing Haj and giving Zakath (charity). Instructions about the implementation of laws are present in the Quran and Sunnah (traditions of prophet Mohammad (PBUH)) and are approved by the consensus of Ummah (followers of Prophet Mohammad (PBUH)). It is the fact that following these laws not only guarantees the success in the life hereafter but also in this worldly life. Unfortunately, the western movement of discarding the concept of GOD and his laws is not permitting common people to have self-control and be in senses. The western movement does not accept any moral responsibility. For these reasons, their movement is not favouring even those teachings, which are common in all religions.

Unfortunately, people from all religions except Islam have accepted defeat before the western movement. The Muslim society is straight forward in withstanding this situation. Muslims continue to insist that the laws should be divine. The laws should be drawn from the divine revelation.

Since Muslims believe the Islamic law to be a proper one, the westerners feel the necessity of suppressing it more vigorously. Because of their wrong propaganda at mass level and the usage of all kinds of media against Islam, many non-Muslims and even some of the Muslims are getting affected.

In this background the author has written few articles on the Muslim personal law and the issues that are raised against it. Author has tried to clarify the doubts that are hoisted against the

law. In this regard Tafheem-e-Shariat Committee for Women (Telangana and Andhra Pradesh) of All India Muslim Personal Law Board (AIMPLB) organized a Two-Day National Workshop on "The understanding of Islamic Shariah" during 22nd-23rd March 2014, at Al-Mahad Al-Aali Al-Islami, Hyderabad. On this occasion, these articles were published in the form of a book (Urdu version).

It is our pleasure that one of our Muslim sisters, Dr.Quddusa Sultana(Ph.D. Research Supervisor, Department of Electronics and Communication Engineering, Osmania University, Hyderabad), a pen maker, a writer and an active worker of the Tafheem-e-Shariat Committee for Women (Telangana and Andhra Pradesh) has translated the specified book into English and extended it with the relevant statistics and explanation. She has already worked extensively and appreciably for the Islamic law of inheritance. I would like to thank her for the translation of the book and its extension with relevant statistics.

I am also grateful to Mrs. Jaleesa Sultana Yaseen (advocate), Joint Convenor, Tafheem-e-Shariat Committee for Women (Telangana and Andhra Pradesh) for her endeavour to make the book available for English readers.

I pray that the book becomes beneficial and removes the thorns of doubts that are raised against the Islamic law. May Allah help us for the cause!

Khalid Saifullah Rehmani 15 Rabi-as-Sani, 1436H
Secretary and Convenor 6th February 2015
Tafheem-e-Shariat Committee
All India Muslim Personal Law Board

CONTENTS

CHAPTER 1

THE ISSUE OF CHILD MARRIAGE

1.1 INTRODUCTION

According to the UNICEF, Child marriage is a 'formal marriage' or 'informal union' entered into by an individual before reaching the age of 18. The legally prescribed marriageable age in many jurisdictions is below 18 years, especially in case of girls; and even when the age is set at 18 years, many jurisdictions permit earlier marriage with parental consent or in special cases, such as teenage pregnancy [1].

People, who try to fasten a certain age for marriage, think that the child marriage is harmful to health of a girl. According to them, she has to become a mother before completion of her physical growth and attainment of sufficient reproduction ability.

There are various issues to be discussed in this regard from:

- Medical point of view
- Morality point of view and
- Islamic point of view

These issues are elaborated in this chapter while referring various sources of information, including the Quran and Sunnah. Initially, the history and reasons of child marriage are described to prove that the issue of child marriage is not confined to Muslims. Further, the age of consent of marriage and the differences in the law of marriage worldwide are paid attention. Furthermore, the vulgarity spread in the world especially in the western society as the consequence of improper marriage laws is briefed. National

and international status and tendency of child marriage is also covered.

1.2 THE HISTORY OF CHILD MARRIAGE

Child marriages were common throughout the history for a variety of reasons. The practice began to be questioned in the 20th century, when the age of individuals' first marriage started increasing [2].

In ancient and medieval societies, it was common for girls to be affianced at or even before puberty [3][4].

- In Greece, early marriage and motherhood for girls was encouraged [5]. Even boys were expected to marry in their teens. With an average life expectancy between 40 to 45 years, early marriages and teenage motherhood was typical.
- In Ancient Rome, girls were married above the age of 12 and boys above 14 [6].
- In the middle Ages, under English civil laws that were derived from Roman laws, marriages before the age of 16 were common. In Imperial China, child marriage was the norm [7][8].

1.3 REASONS FOR CHILD MARRIAGE

There are various reasons existing worldwide to prefer child marriage, such as:

- Dowry and bride price
- Economic condition of parents
- Wars and military campaigns
- Arrests and forced migrations
- Social insecurity

- Fear of rape
- Fear of illicit relationship or elope of the girl
- Shortage of grooms
- To secure political ties

1.3.1 The Problem is not limited to Muslims

Some of the people think that the child marriage is the problem of Muslim society, even though such incidents are rare among Muslims and are frequent in non-Muslims. The major reasons have been poverty, lack of education, culture and the custom of the area. This is obvious by surveys made by the UNICEF and other organisations worldwide. In this section, few relevant statistics are presented whose source of information is the UNICEF.

Fig. 1.1 shows the distribution of girls aged 15-19 in union with respect to poverty. It can be seen that the richest category is only 20% that too because of the cultural tendency and prevailing customs.

Fig. 1.2 shows the distribution of girls aged 15-19 in union with respect to education. It can be seen that the girls with education higher than that of secondary school are very rare in child marriage case.

Moreover, the union in poor and less educated countries is usually due to formal marriage. Whereas, the union between boys and girls among developed and educated countries is due to informal and illegal methods, such as cohabitation and dating.

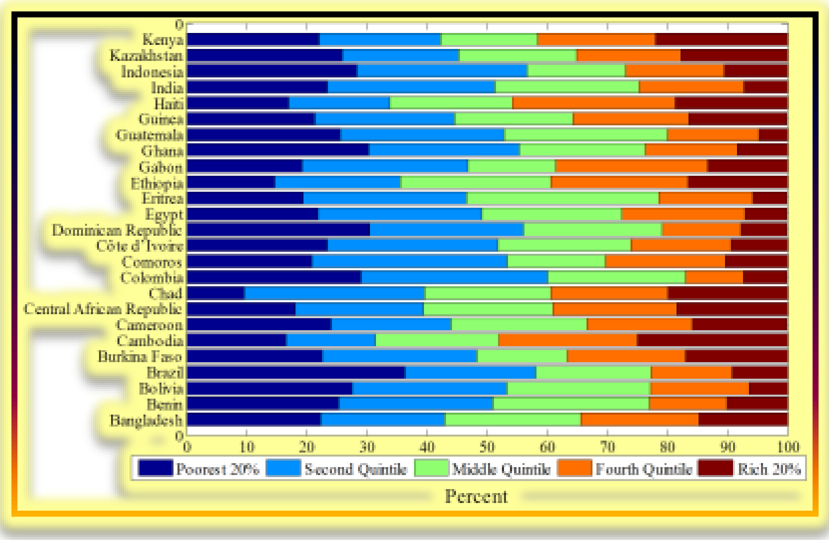


Fig 1.1 Distribution of girls aged 15-19 in union, by household wealth
Source: UNICEF (2005)

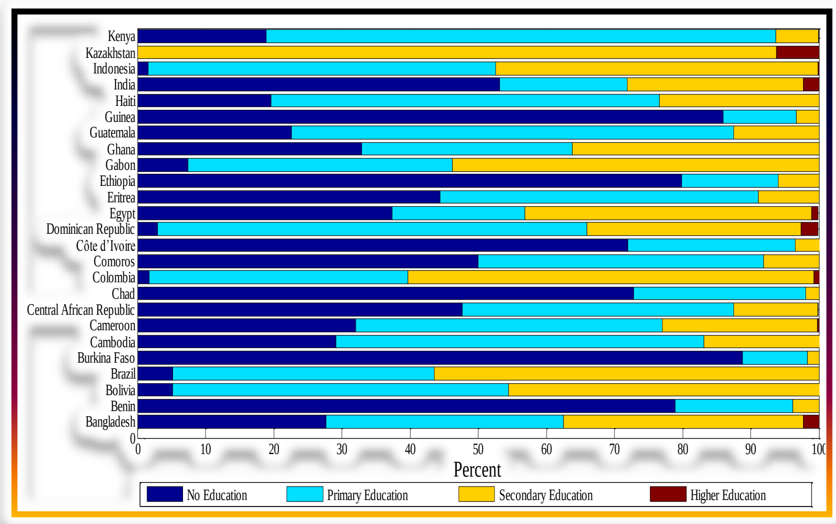


Fig. 1.2 Distribution of girls aged 15-19 by level of education
Source: UNICEF (2005)

Fig. 1.3 shows the percentage of girls aged 15-19 currently in union throughout the world. Percentage in poor and underdeveloped countries with less education levels is more.

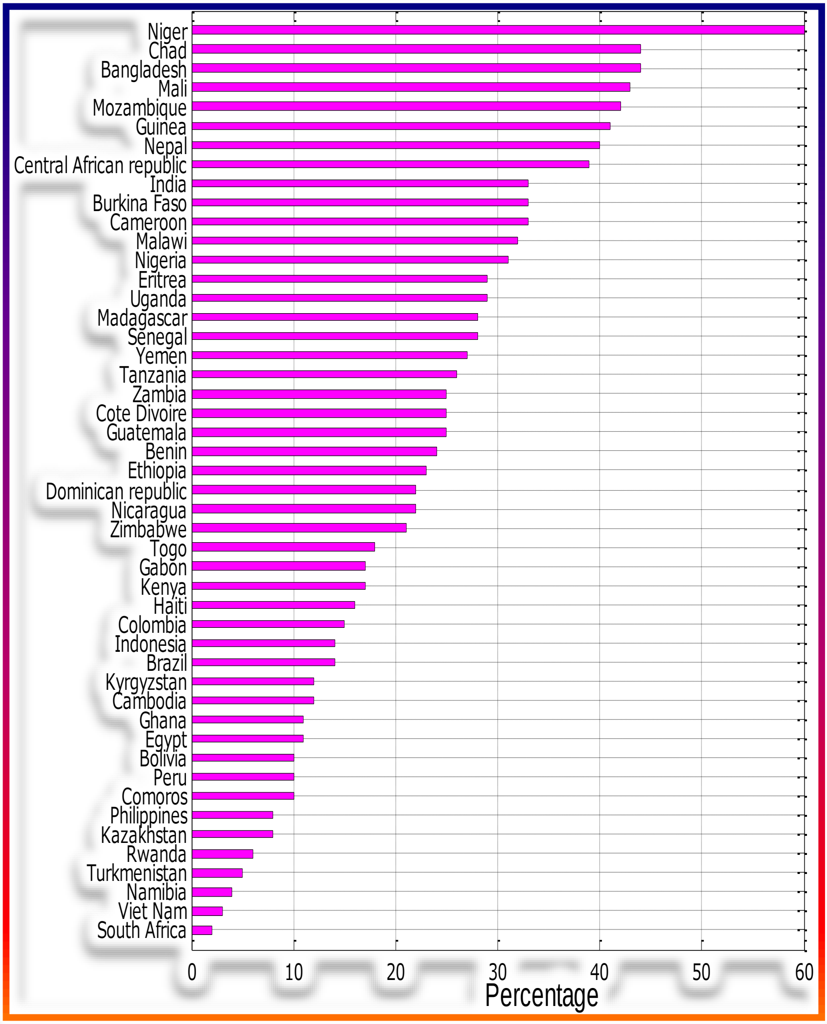


Fig. 1.3 Percentage of girls aged 15-19 currently in union

Source: UNICEF (2005)

1.4 AGE OF CONSENT FOR MARRIAGE

The age of consent for marriage varies worldwide. It depends mostly on seasonal and cultural differences. In some of the countries there is no law for the consent. Following is the list of some of the countries with the minimum consent of age [9]:

- Albania: 14 for girls and boys
- Angola: 12 years
- China: 14 for all genders
- Canada: 16, exemptions for partners close in age apply
- Japan: 13, although individual regions can set the age as high as 18.
- Mexico: 12 is the federal minimum, but states can set individual restrictions. Some put age of consent as high as 18.
- Zimbabwe: 16 years
- Antarctica: No specific age

It can be seen from the world map of Fig. 1.4 that the age of consent for women varies with region [10]. Similarly, the age of consent for men is shown in Fig. 1.5. As the puberty age depends on the climate, seasonal effects and gender, the differences in the age of consent can be found accordingly.

Here the age of consent means the age to agree for marriage among heterosexuals. The western society has become so much vulgar and crooked that the marriage among homosexuals is permitted and the age of consent is defined even for this inhuman act.

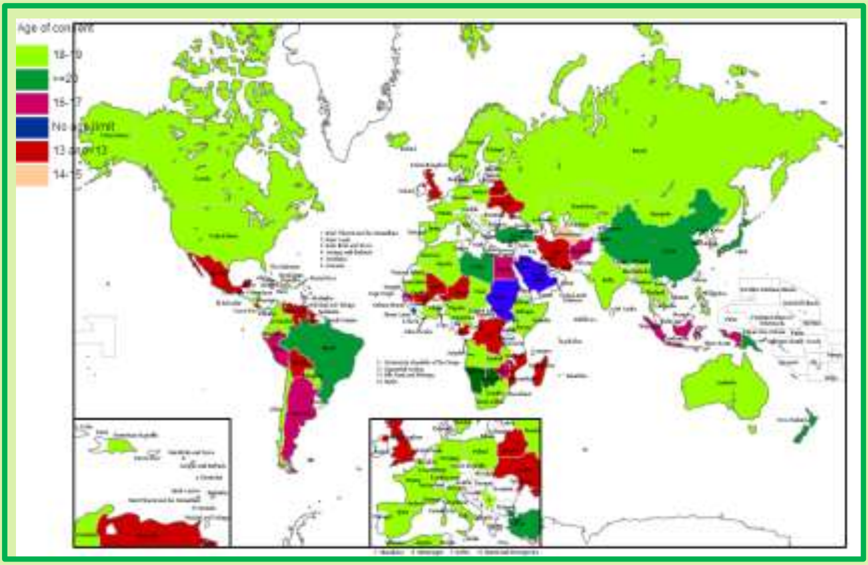


Fig. 1.4 Age of consent of marriage for women

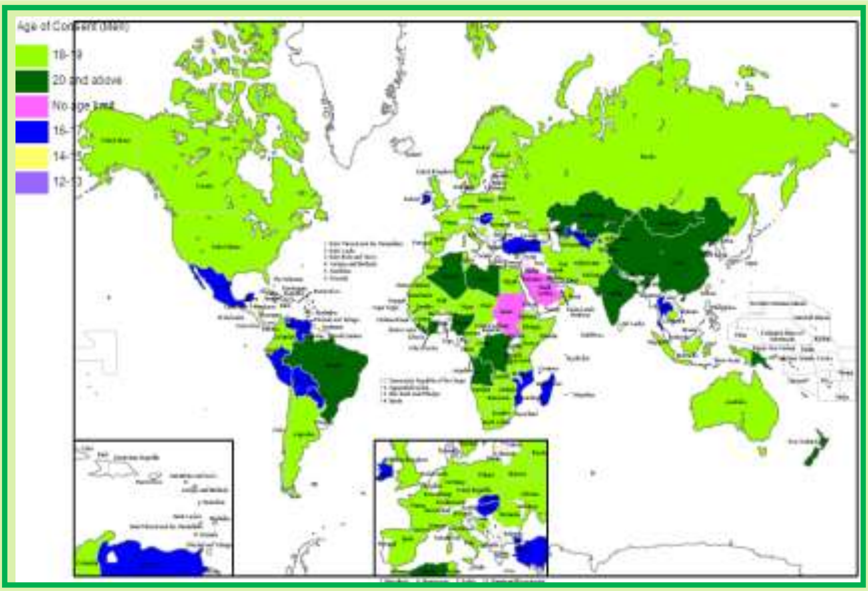


Fig. 1.5 Age of consent of marriage for men

1.5 VARIATIONS IN THE MARRIAGE LAW WORLDWIDE

The laws in many countries agree to child marriage, that is, the marriage of girls and boys less than 18 years of age. Such laws are neither confined to the developing countries nor to the state religion [1].

The minimum legally permitted age of marriage is less than 15 in some of the countries, such as:

- In European countries, Catholic law sets 14 as the minimum age for the marriage of girls.
- Spain assigned 14 as consent age with a legal guardian's permission.
- Laws regarding child marriage vary in different states of the United States.
- In North America, especially in Mexico, girls can be legally married at age 15.
- Canada and many states in the US, child marriage can be made possible with court's permission.
    - Girls below 16 can marry if they are pregnant and have the court's approval.
    - Children under 16 require a court order in addition to parental consent.
    - Children at 16 and over (<18) may marry with parental consent.

Until 2008, the fundamentalist Church of Jesus Christ of Latter Day Saints (LDS) practiced child marriage at the age of puberty of girls as part of its polygamy practice. In 2008, the Church changed its policy in the US and favoured the local laws.

1.6 CHILD MARRIAGE STATUS WORLDWIDE

According to the UNICEF, worldwide, more than 700 million women alive today were married as children. More than 1 in 3 or some 250 million were married before 15. Today, child marriages are still fairly widespread in some developing countries. The well-known parts of the world for child marriage are [1]:

- South Asia, Southeast Asia, East Asia, West Asia
- Latin America
- Parts of Africa
- Oceania
- Latin America
- Caribbean islands

Here, poverty, lack of education and laws mandating minimum age for marriage are the reasons for child marriage.

Fig. 1.6 shows the percentage of child marriage existing worldwide [11]. It can be seen that other than Asian countries, European as well as American countries show huge percentages.

The highest child marriage rates in the Americas are found in:

- Dominican Republic
- Honduras
- Brazil
- Guatemala
- Nicaragua
- Haiti and
- Ecuador

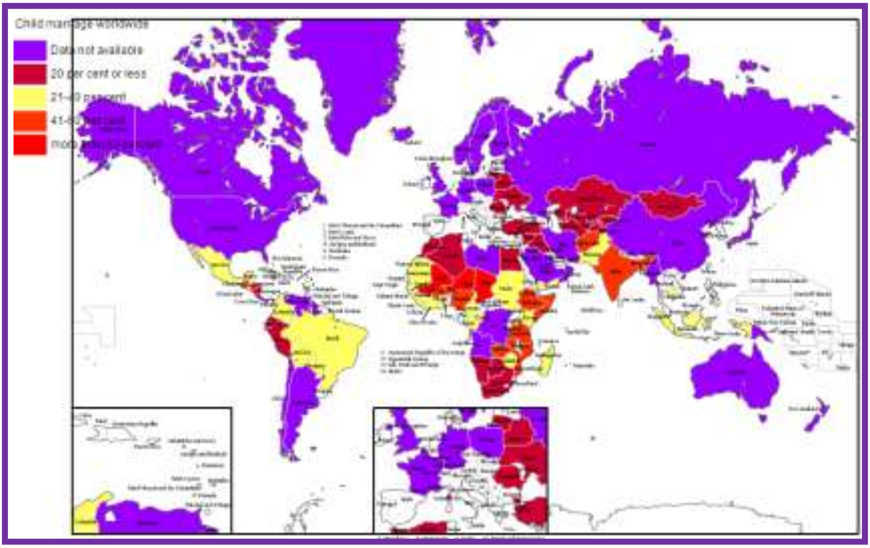


Fig. 1.6 Percentage of child marriage worldwide

According to a recent UNICEF report (2005) the percentages of girls aged between 15 and 19 years who are married in different countries are:

- Congo (74%)
- Niger (70%)
- Afghanistan (54%),
- Bangladesh (51%)
- Iraq (28%)
- Nepal (40%) girls get married before they turn 15 years

1.7 CHILD MARRIAGE IN INDIA

According to the UNICEF's "State of the World's Children-2009" report:

- 47% of India's women aged 20–24 were married before the legal age of 18.

- 56% married before age 18 in rural areas.
- 40% of the world's child marriages occur in India.

The Fig. 1.7 is based on the UNICEF survey of 2001.

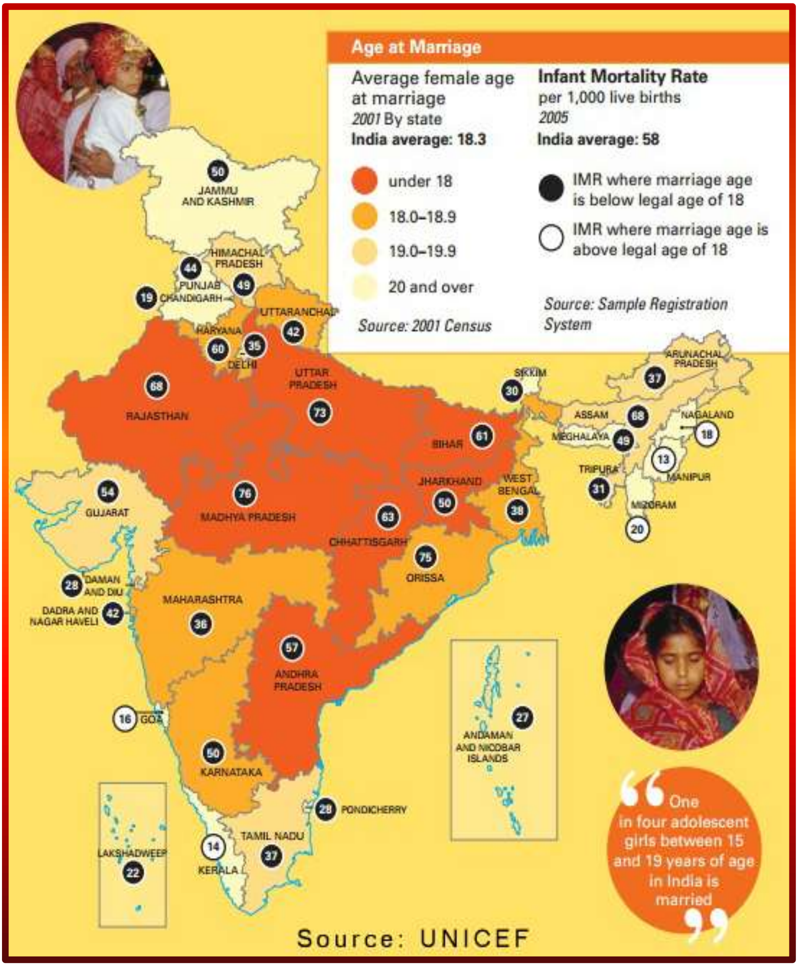


Fig. 1.7 Variations in the age of marriage throughout India
Source: UNICEF (2001)

The figure shows few states of India with more tendency of child marriage. These are Rajasthan, Utter Pradesh, Madhya Pradesh, Chhattisgarh, Jharkhand, Bihar and Andhra Pradesh.

According to Raj et al., [12] the small sample household survey data suggests: 22% of girls ever married aged 16–18, 20% of girls in India were married between 13-16, and 2·6% were married before age 13. The District Level Household and Facility Survey **(**DLHS**)** team of India has prepared the graph sheet (Fig. 1.8) based on its survey (2007-2008).

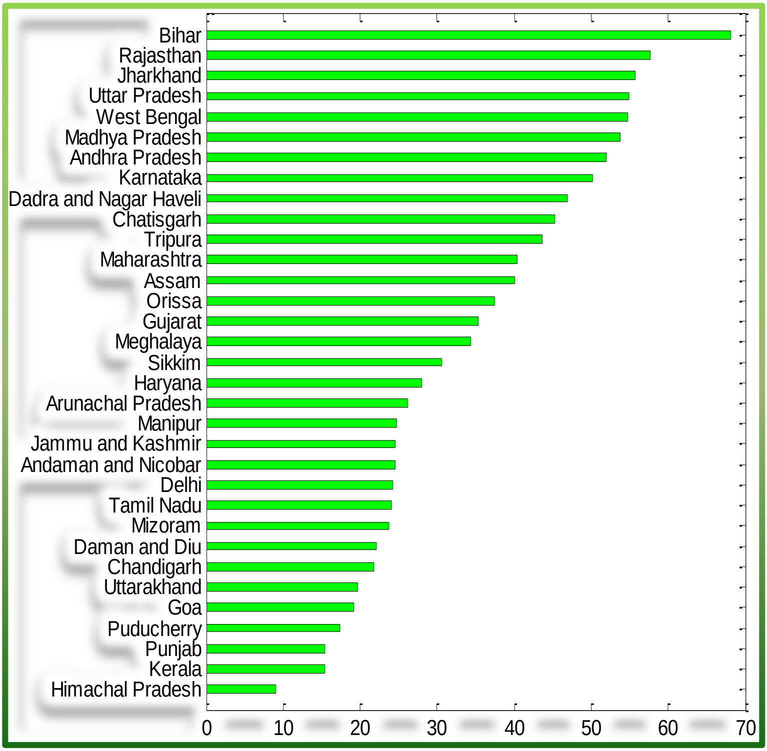


Fig. 1.8 Percentage of women age 20-24 married before 18
Source: DLHS-3 (2007-2008)

From the figure it can be noted that Bihar has the highest child marriage percentage i.e., 68.2%. Himachal Pradesh has the least child marriage percentage (9%)

The latest available UNICEF report for India uses 2004-2005 household survey data, on a small sample and other scholars report lower incidence rates for India.

Fig. 1.9 shows that the tendency of child marriage is more in rural area compared to that of urban. It is due to lack of education and poverty in rural areas.

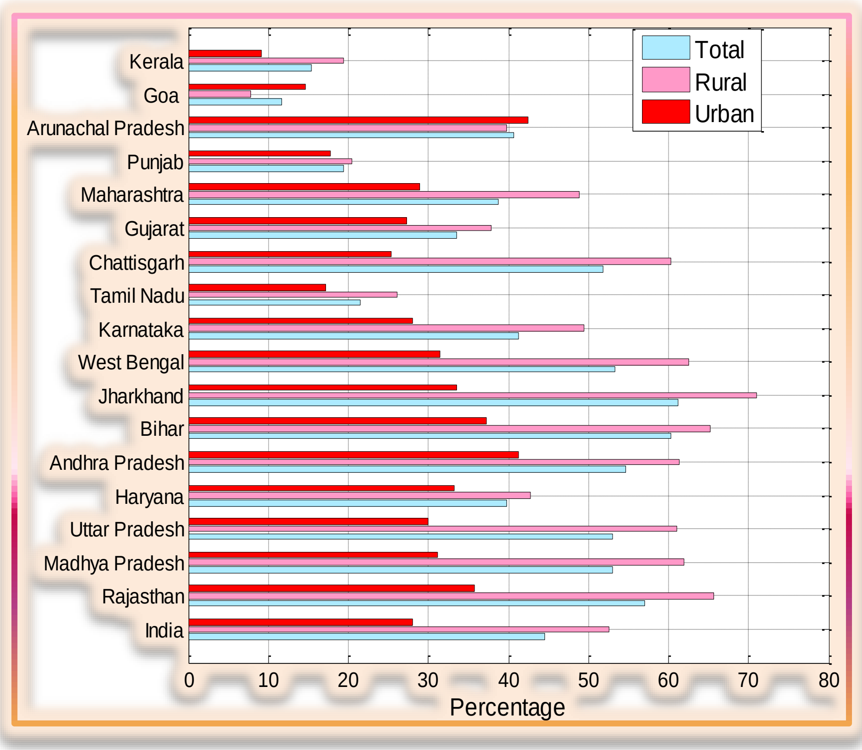


Fig.1.9 Child marriage tendency in rural and urban areas
Source: NFHS-3 (2005-06)

The custom of child marriage is not prevailing in the cities. It occurs usually in remote areas and hardly any incident is brought to the coverage of law and order.

A state wise analysis done by the National Family Health Survey (NFHS) (2005-06) in this concern is given in Fig. 1.10 and Fig. 1.11. The recent survey shows the present reality in terms of currently married women who were married by the age of 18 years.

1.7.1 Consent of girls for their marriage in India

In most north Indian communities, Hindu festivals such as Akha Teej, Ganesh Chaturthi, Pipal Punyo, Phulera Duj and so on, are seen as auspicious times for child marriage practices. In Rajasthan, even today thousands of baby-girls get married on the occasion of 'Akha Teej'. In some of the areas of Rajasthan, Madhya Pradesh, Orissa and Haryana the custom of child marriage (at a very young age) is prevailing among the Hindu society.

The map in Fig. 1.10 records the percentage of ever married women 25-49 who report that their parents chose their husbands and they were not permitted to speak for the selection (35% of all women).

Another 23% of women report that their parents chose their husbands but that they were given little weightage in the decision. 37% report that their parents and they arranged the marriage jointly. Only 5% report that they chose their husbands by themselves [13].

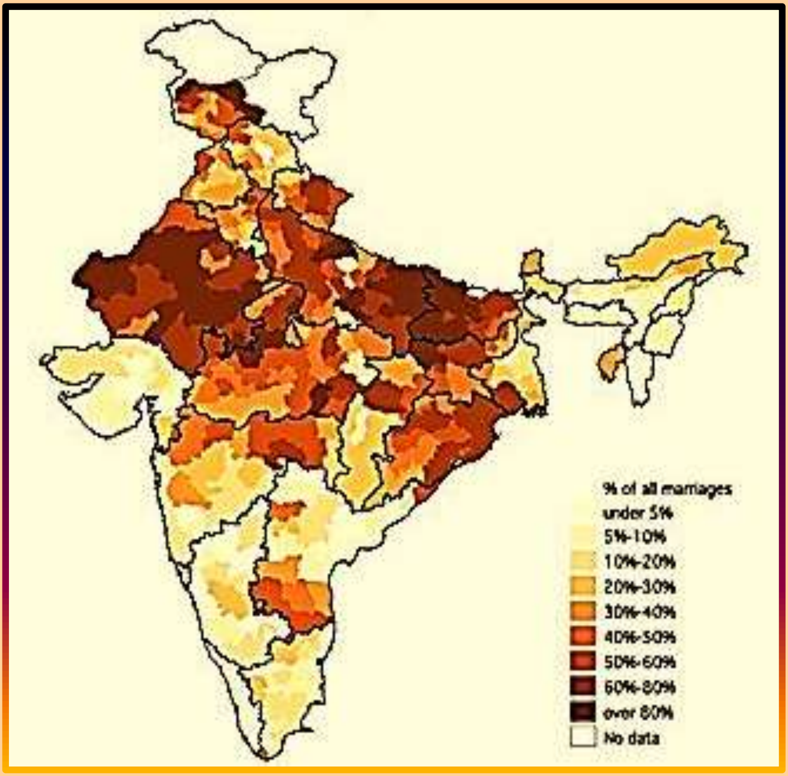


Fig. 1.10 Arranged marriages in India with no consent

The National Family Health Survey (NFHS) (2005-06) reports that:

- Girl-children are usually not informed of their marriage.
- Most of the time, they are not permitted to question their parents, of their marriage.
- Parents claim that soon after marriage girls stay at home till they reach 18, and then send to their husband's home through a custom called as 'Gauna'.

- Practically, Gauna is celebrated when the girl reaches puberty age (11 to 14 years in India).
- In reality, there is no connection between the legal age of marriage and the period of Gauna, as the India girl attains puberty before the age of 18.

Fig. 1.11 shows that in India 35% of the marriages are conducted without the consent of the bride and 86 % of the girls have met their husband first time on the day of marriage [13].

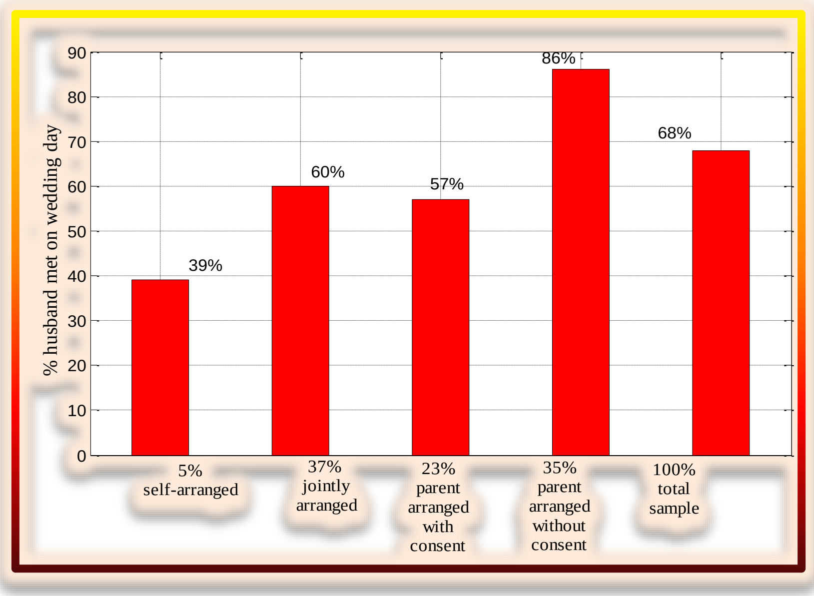


Fig. 1.11 Approach of marriage arrangement in India

Hence in the Hindu society, the girls' sentiments are hardly given any weight. Whether a girl agrees or disagrees no one bothers and marriage proposals are imposed on her. Especially, in a marriage arranged in childhood, either party has no rule to play. At least Islam permits the husband and wife to dissolve such marriage

after reaching the age of puberty through a law called as 'Option of Puberty' (خياربلوغ).

1.7.2 Decline in child marriage rate in India

The Table 1.1 shows the percentage of child marriage according to the surveys performed by various organizations, in different years. Comparing surveys made by the Census of India for different years, it can be concluded that as the time is advanced the percentage in child marriage for girls is being reduced.

Table 1.1 Decline of child marriage rate in India

Source	%Female married (<18)	Year	Sampling Method
UN	30	2005	Small sample survey
NFHS-3	44.5	1998-2002	Small sample survey
ICRW	47	1998	Small sample survey
Census of India	43.4	1981	Nationwide census
Census of India	35.3	1991	Nationwide census
Census of India	14.4	2001	Nationwide census

- According to a 2009 representative survey, the child marriage rate in India dropped to 7%.
- The Census of India in its 2001 demographic report, stated zero married girls below age 10.

- 1.4 million married girls out of 59.2 million girls in the age 10-14.
- 11.3 million married girls out of 46.3 million girls in the age 15-19 (which includes 18-19 age group).
- The Census of India (2011) reports child marriage rate dropped further to 3.7% of females aged less than 18.

According to 2011 Nationwide Census of India, the average age of marriage for women in India is 21.

The incidents of child marriage are reducing very fast. At the age of 14-15 years, boys and girls complete their matriculation. Now a day trend in girl-education is almost equal to that of boys. During education period, usually marriage is avoided. For boys the problem is bigger, as they need to start earning before getting married. Consequently, the marriages are occurring at the age which is beyond 18 years. As the education standards keep enhancing in the society, the marriage age keeps on increasing, automatically suppressing the concept of child marriage. To change the society, education should become common, only laws are not sufficient.

Over the last one and half decade there has been a 10 percent decline in the proportion of child marriage in India (Fig. 1.12). The situation is similar in almost all the states in India, with exception in West Bengal and Punjab.

A similar decreasing trend could be observed in the western world especially in U.S (Fig. 1.13).

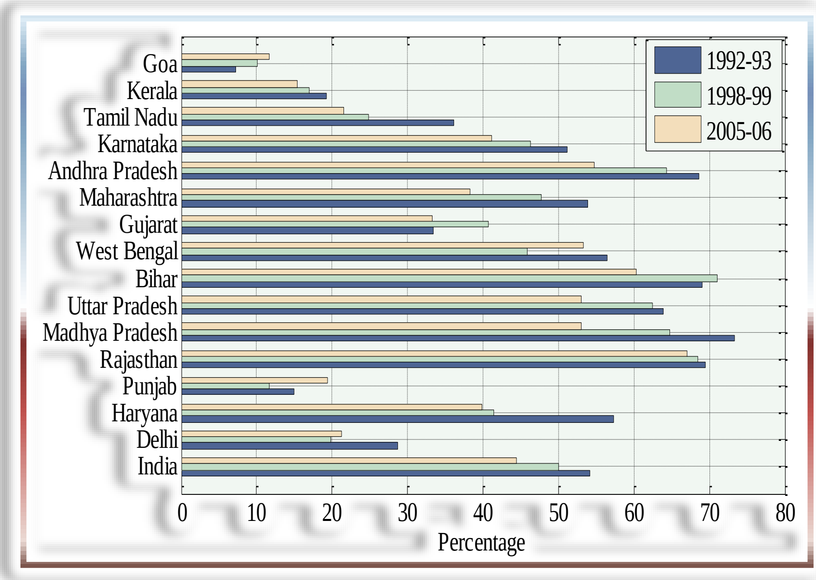


Fig. 1.12 Trend in percentage of child marriage in India
Source: NFHS-1, NFHS-2 and NFHS-3

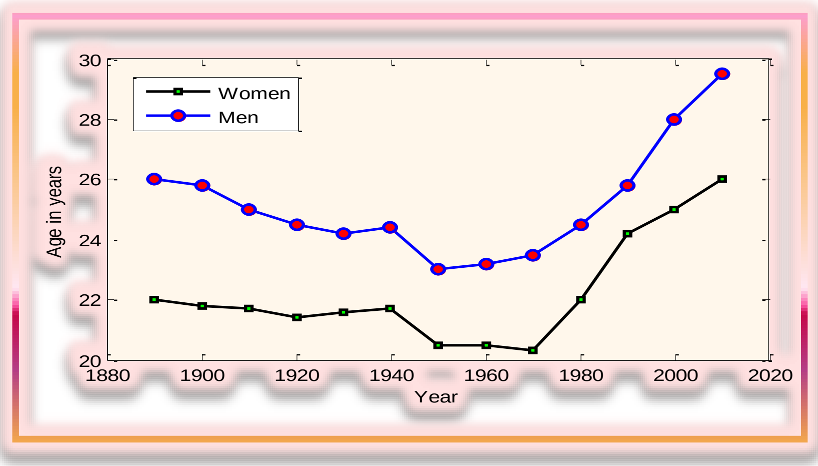


Fig. 1.13 Median age at first marriage is at a historic high
Source: U.S. Decennial Census and Current Population Survey

1.8 CHILD MARRIAGE FROM THE MORALITY POINT OF VIEW

Secondary consideration is the extreme vulgarity spread in today's society through T.V., magazines, internet, cell phones and film-videos. These sources have made the new generation enter into illegal sexual interactions at early age. Consequently, abortions of unwanted foetuses have become intensified.

In the western society, children gain sexual knowledge at an early age that is inappropriate for them. This leads to premature sexualisation [14]. The causes of this premature sexualisation that are cited include [15]:

- Portrayals in the media of sex and related issues.
- Marketing of products with sexual implication to children, including clothing.
- Lack of parental oversight and discipline.
- Access to adult culture via the internet.
- Lack of comprehensive school education programs.

Sexualisation of girls occurs almost everywhere in today's dominant culture, from media and advertisements, to clothing and toys marketed for young girls.

In every source of media, the sexualisation of women and girls can be easily found such as [16]:

- Television
- Music
- Videos
- Movies
- Magazines
- Sports media
- Video games

- Internet
- Advertising

Due to the vulgarity and the sexualisation of girls, spread throughout the world, especially in the western world, the unwed teenage pregnancy births have increased.

The question is whether the child marriage is more harmful or the sex experiences of a child. Certainly, the latter situation is intolerable. In such circumstances, if parents arrange the marriage of their children soon after their attainment of puberty, to protect their morals and character, is it not appropriate?

The actual problem is of child sex and not of the child marriage. Indian government, organizations and associations working for the social reform should protect the Indian society from the wind of vulgarity that has affected the country, especially the educational institutions very badly.

This section describes the western society, which has given total liberty to teenagers for illegal relations in the name of human rights.

1.8.1 Teenage dating and sexual activities in the western world

As stated, the UNICEF definition of child marriage includes couples who are formally married, or who live together as a sexually active couple in an informal union, with at least one member, usually the girl being less than 18 years old.

The latter practice is more common in the United States, and it is officially called cohabitation. In the name of dating, they spend few nights together on some particular dates. From three different

sources of US, statistics are collected and presented in this section. They are:

- US Dept. of Health and Social Services (DHSS)
- US Dept. of Justice (DOJ)
- US National Centre for Health Statistics (NCHS)

Further, to have an idea of the status of other countries, Australian data is also presented on this issue.

US Dept. of Health and Social Services (DHSS): DHSS has done survey to observe the teenage dating and the sexual activities. The survey details are shown in Fig. 1.14. It shows that 74% children by age 15 have cohabited. By the time they reach 18, 94% would have been cohabited. This data is of 2008. Present status (February, 2015) is the worst.

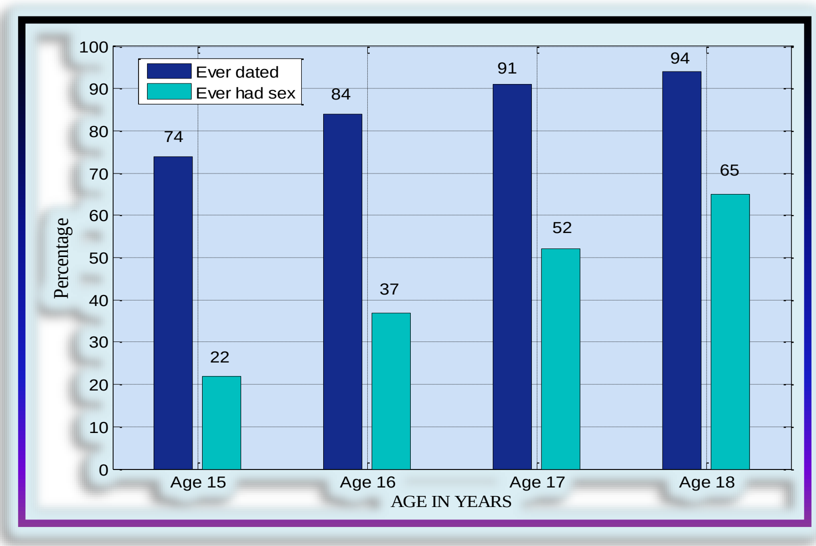


Fig. 1.14 Teenage dating and sexual activities in US (2008)
Source: U.S., Department of Health and Social Services

U.S Dept. of Justice (DOJ): DOJ collects the data on cohabitation nationwide. Fig. 1.15 shows the increasing trend in cohabitation by education, during 1987 to 2008. From the figure it can be observed that in 1987, 43% and in 2008, 73% of children less than 12 have cohabitated. Also, in 1987, 31% and in 2008, 47% of children less than 18 have cohabitated.

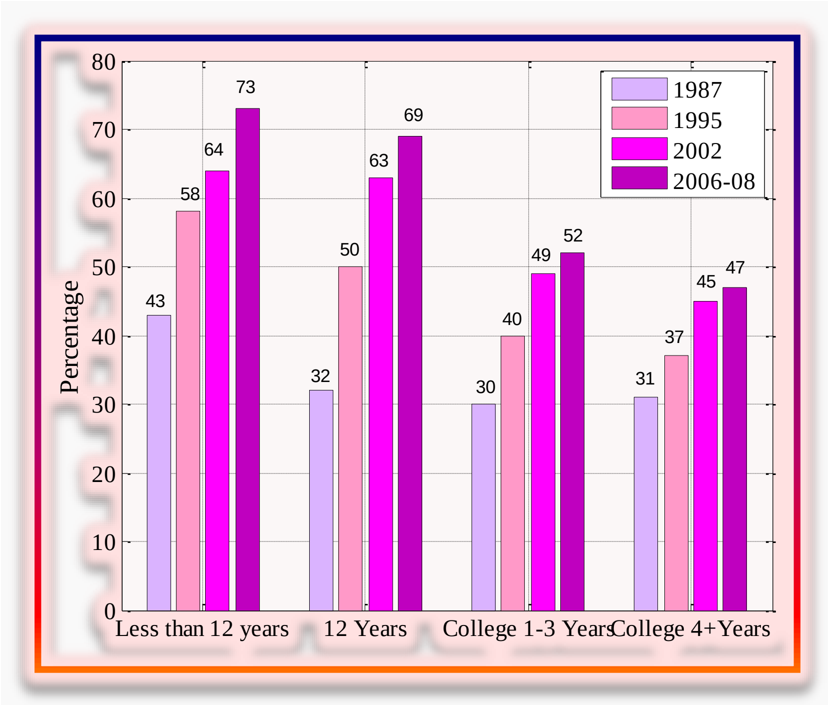


Fig. 1.15 Percentage of women ever cohabited (US)
Source: US Department of Justice

National Centre for Health Statistics (NCHS): According to a 2010 report by NCHS, an agency of the government of United States:

- 2.1% of all girls in the 15-17 age groups were in child marriage.

- In the age group of 15-19, 7.6% of all girls in the United States were formally married or in an informal union.

Australian Institute of Family Studies (AIFS): AIFS, Government of Australia has performed survey (2006) to get the information of persons living with a partner with respect to percentage of cohabitation or marriage (Fig. 1.16).

It can be observed that the percentage of teenagers (15-19 years) that are cohabiting is the maximum (85%). Present status (2015) is expected to be 100%. It looks as if there is no one to care for the divine laws in Australia.

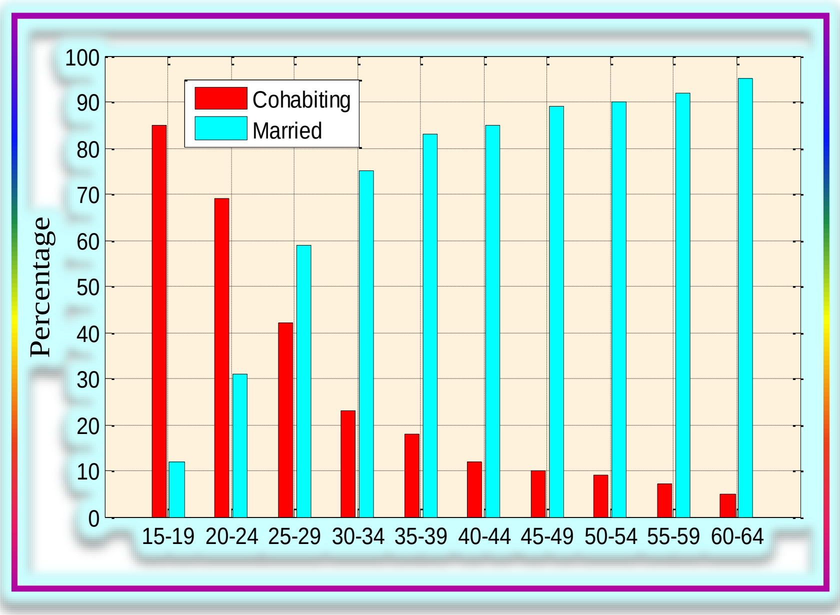


Fig. 1.16 Cohabiting and married couples in Australia (2006)

Source: ABS (2007), 2006 Censés Tables, Catalogue No. 2060.0

1.8.2 Unwed teen births in the western world

Over 350,000 babies are born to teenage mothers every year in the United States, and over 50,000 of these are second babies to teen mothers (NCHS, 2010).

The National Vital Statistics System (NVSS): NVSS, US, is the oldest and most successful example of inter-governmental data sharing in Public Health and the shared relationships, standards, and procedures form the mechanism by which NCHS collects and disseminates the Nation's official vital statistics.

The data collected by NVSS on the non-marital births by age (U.S) during 1970 and 2007 is given in the Fig. 1.17.

- In 1970, 50% of the births were to unwed women of less than 20 years.
- In 2007, 23% births were to unwed women of less than 20 years.

The decline is expected to be due to high abortion rate made possible by the latest technology and medication methods.

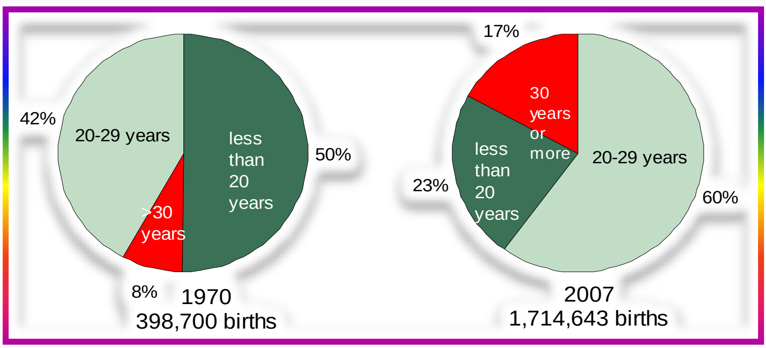


Fig.1.17 Distribution of non-marital births by age: 1970 and 2007
Source: National Vital Statistics System (NVSS), US

US Demographic Yearbook: Unwed teen birth rates internationally, per 1000 girls aged 15-19 (2008) are shown in Fig. 1.18 for the year 2008. United States (43%) and United Kingdom (39%) had the highest teenage pregnancy rates in the world.

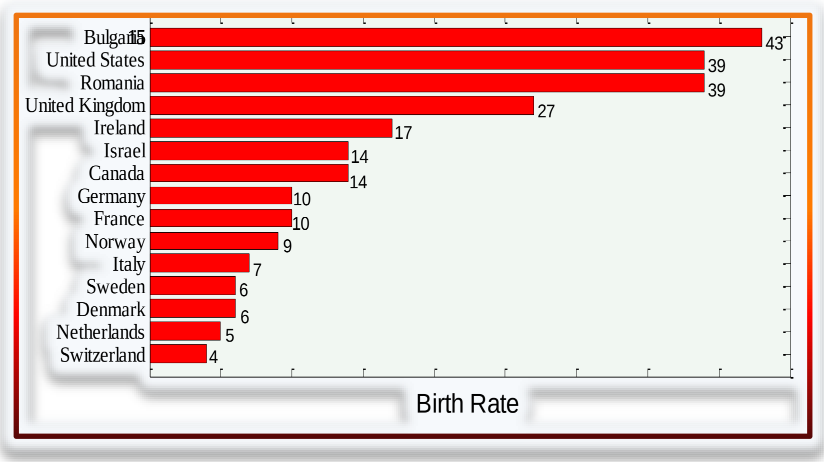


Fig. 1.18 Unwed teen birth rates around the world
Source: UN Demographic yearbook (2008)

The National Centre for Health Statistics (NCHS), U.S., is a rich source of information about America's health. It is the Nation's principal health statistics agency. It reported in 2011 that nearly 9 in 10 children born to teenage mothers are born outside of marriage - a more than six-fold increase since 1950 (Fig. 1.19).

Fig. 1.20 shows the data collected by NVSS for unwed mothers for the year 1991 and 2012. Over half of all children born to women under 30 in 2012 are born outside marriage.

A wealth of research says that marriage is good for children.

- They do better in school; are healthier, and

- Are less likely to grow up in poverty

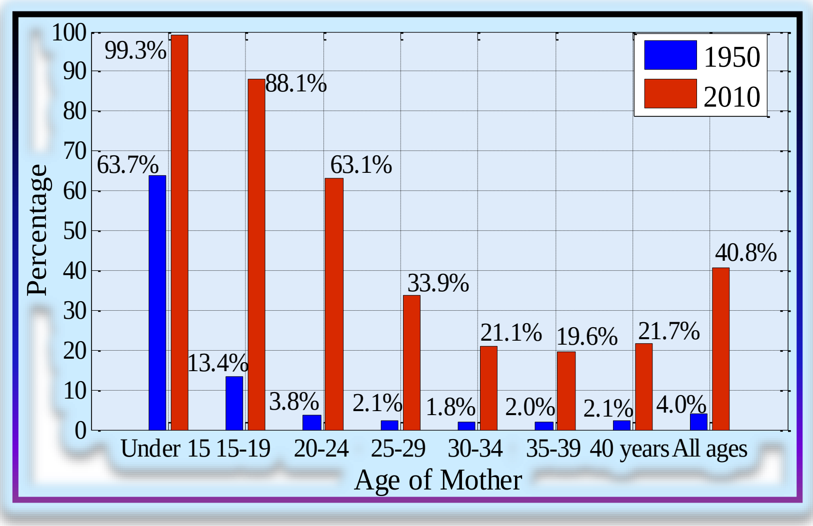


Fig. 1.19 Percentage of births to unmarried mothers
Source: NCHS (US), Vital Statistics Reports, 2011

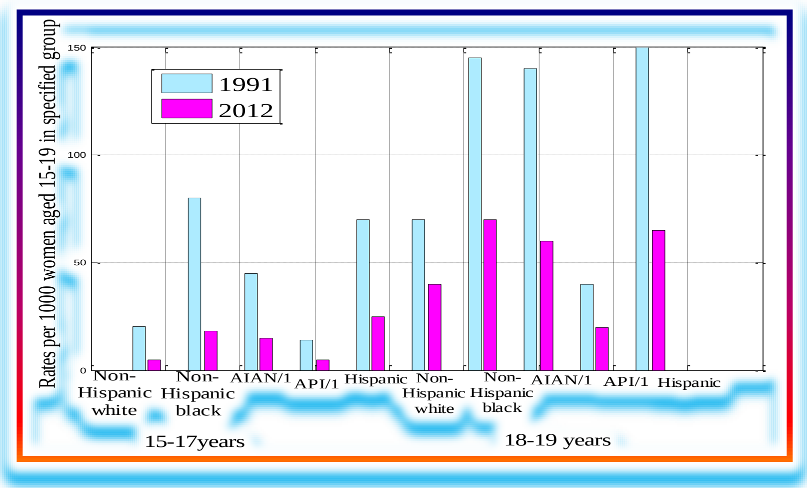


Fig. 1.20 Birth rates for teenagers in U.S
Source: CDC/NCHS, National Vital Statistics System

Many of the births outside of marriage are to couples who are cohabiting, but roughly, three-in-ten of these couples break up within three years, leaving a single parent, usually the mother, to raise the children.

The increase among mothers, in their early twenties, is especially pronounced, i.e., a 16-fold jump. The increase among unwed mothers age 30 and older is at least 10-fold.

Fig. 1.21 shows annual births per 1000 teenage women worldwide in 2012 [17]. It can be seen that trend is prevailing in the whole world.

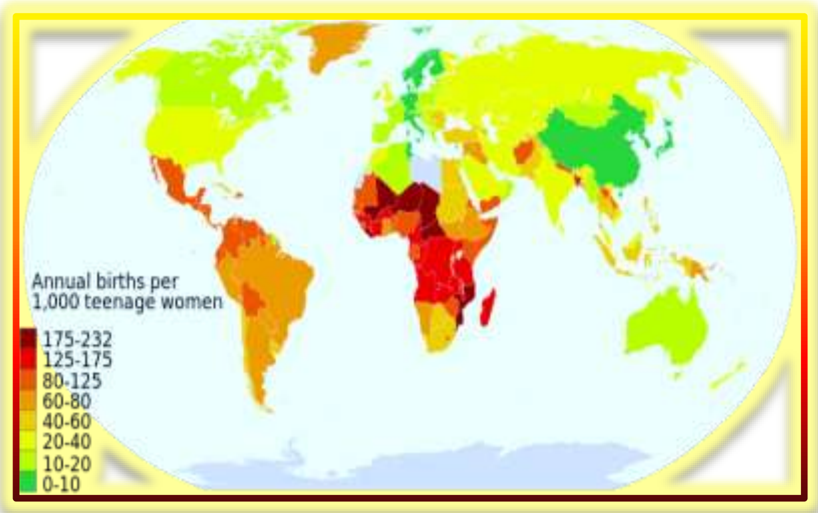


Fig. 1.21 Annual births per 1000 teenage women worldwide

1.8.3 Abortion rates among teenagers

Abortion rates are increasing in the western world day by day. Fig. 1.22 shows abortion rates by relationship status in US [18]. In 2011, the abortion rate was 59.3 (per 1000) among cohabiting couples. Fig. 1.23 shows teen births and abortions among the

children (13-15 years) in England and Wales [17]. It can be observed that abortion rates among teenagers are almost doubled.

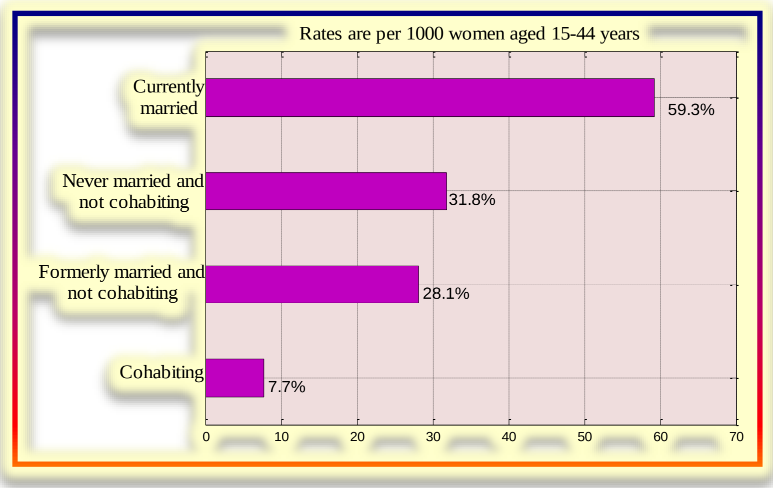


Fig. 1.22 Abortion rates by relationship status (US-2011)

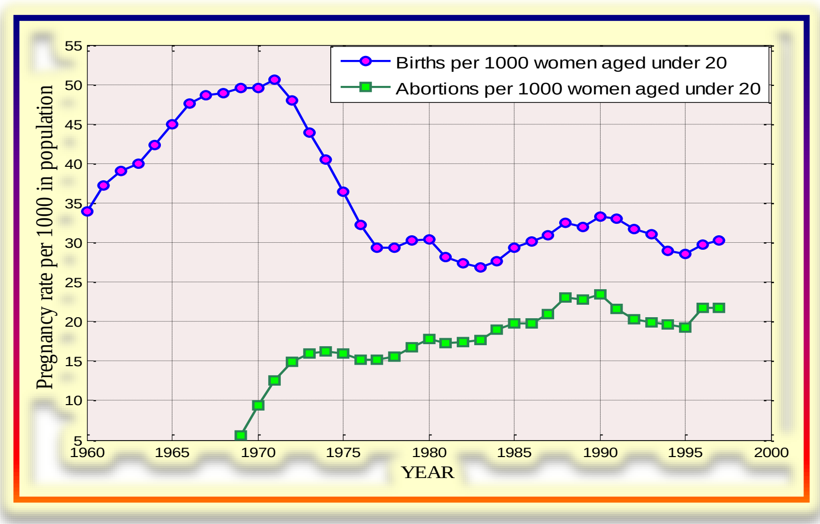


Fig. 1.23 Births and abortion among teens of England and Wales

Fig. 1.24 shows teen (15-19 years) abortion rates that vary widely in countries with liberal abortion laws [19].

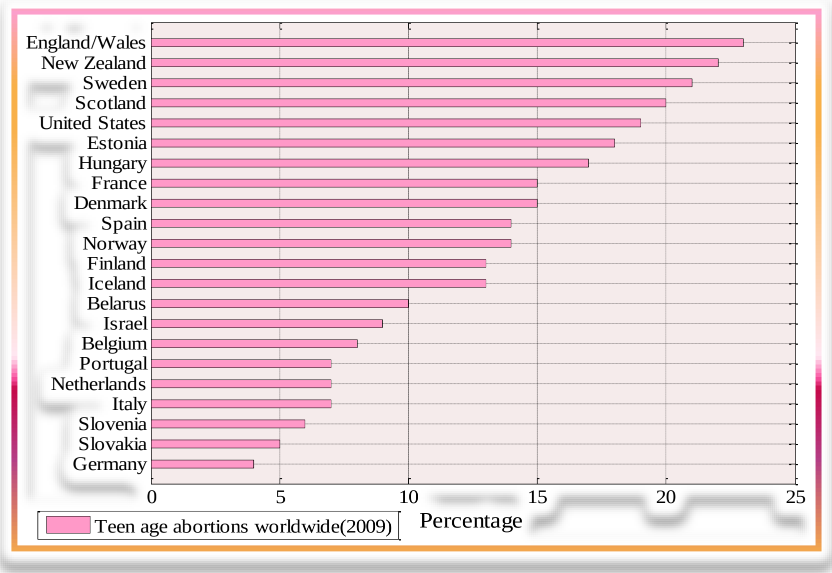


Fig. 1.24 Teenage abortions worldwide (2009)

Studies show that adolescent girls are often in abusive relationships at the time of their conceiving. A UK study found that 70% of women who gave birth in their teens had experienced adolescent domestic violence. Similar results have been found in studies in the US. A Washington State study found 70% of teenage mothers had been beaten by their boyfriends, 51% had experienced attempts of birth control sabotage within the last year, and 21% experienced school or work sabotage [20].

Data collected by Nation Survey for Family Growth (NSFG), US from teenagers about the significance of marriage at early age is shown in the Fig. 1.25. Majority agrees for teenage marriage as

they realise that staying alone in this harsh atmosphere of vulgarity is almost impossible.

1.9 CHILD MARRIAGE FROM THE MEDICAL POINT OF VIEW

Primarily, the physical growth of boys and girls is not uniform everywhere. The climate, food habits, surroundings and hereditary characteristics effect the physical growth of a person and the attainment of puberty.

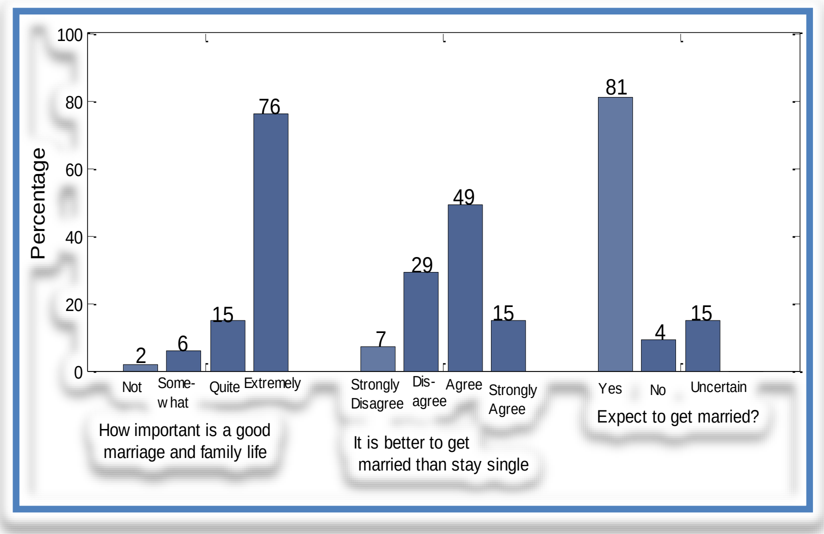


Fig. 1.25 Teenager's attitude in US towards child marriage
Source: Nation Survey for Family Growth (NSFG), US

Neither it can be said that it is not harmful for every girl below 18 years to become mother nor it can be stated that every girl above 18 years can become mother without any health complications. Hence, fixing the age of marriage as 18 years is beyond comprehension. By the laws of nature a woman can reproduce after attaining the age of puberty.

1.10 CHILD MARRIAGE IS PERMITTED IN ISLAM BUT NOT ENCOURAGED

In the Muslim society the trend is to marry after attaining puberty and child marriage is not preferred. In the Quran (4:6), almighty Allah instructs to substantiate the strength of orphans while handing over their assets (inherited) to them in case they reach the age of marriage.

> *"Prove orphans till they reach the marriageable age; then, if you find them of sound judgment, deliver over unto them their fortune", Quran (4:6).*

Here reaching the age of marriage is to attain the puberty. From this verse it can be concluded that the appropriate age of marriage is after attaining puberty. Moreover, Islam permits both boys and girls to agree or disagree with a marriage proposal. After attaining puberty only, a person can decide what is good or bad for oneself. Hence, it is more appropriate to arrange the marriage of adults but not the children.

Prophet Mohammad (PBUH) arranged the marriage of his four daughters only after they reached puberty. Hence, it can be inferred that this is the only proper approach. However, Islam keeps a column open for the child marriage, if the situation arises. Some of the companions of the Prophet (PBUH) arranged the marriage of their children in childhood.

1.11THE WISDOM DEMANDS

The permission of the child marriage is given by Islam as it is required in some critical situations. There are two basic reasons due to which this permission is granted.

Primarily, if in the society morals are devalued, then due to early marriage, the doors towards legal ways are opened. In the hostile environment of the society, if marriage is not permitted till 18years, there is a possibility that boys and girls go astray. Under such circumstances it is preferable to arrange the marriage to stop children from being lost in illegal sexual interactions. If early marriage is not taken as a precautionary measure, then not only the morals get devalued, even health gets spoiled and the society becomes sick.

In Islam, the moral values are extremely important. If children are lost on illegal ways, then even parents are responsible for the situation. There is a tradition of prophet Mohammad (PBUH) in this regard:

> *"Hazrath Abu Saeed Qudri (RAA) and Hazrath Abdullah bin Abbas (RAA) narrates: Prophet Mohammad (PBUH) said: When a child is born to someone, he should give it an appropriate name, nourish and educate and arrange its marriage when it attains puberty. If he does not arrange its marriage even when his child attains puberty and if it enters into a sin, then the father is considered equally responsible",[21].*

Secondarily, if the father is very old and on the brink of death and realises that there is no one to take care of his children after his death. In the meantime, if a good proposal is there at hand, then it is better to arrange the marriage before death. This act not only gives peace of mind to the father but also secures future of his child.

Above specified reasons for early marriage cannot be simply discarded. Hence, the law should be designed in such a way that

the benefits can be derived when needed and disadvantages can be avoided.

The child marriage should be avoided as far as possible. If such a marriage is arranged by someone other than the father or grandfather, then it can be dissolved. It can be dissolved even when the father or grandfather has arranged, in case they are not capable of fulfilling their responsibility in a proper way. These limits are set by Islam to protect oneself from disadvantages of early marriage and benefit one when required. The Islamic teachings are moderate and operable in all kinds of situations. This is the peculiarity and the identity of Islam.

1.12 THE ISLAMIC POINT OF VIEW

Few people believe that in Islam marriage of a minor is not permitted. This is very wrong and is based on views presented by some of the Muslim religious scholars. The marriage of a minor is accepted by the Quran, Sunnah and the consensus of Muslim jurists. Moreover, if boys and girls attain puberty, then it is instructed to arrange their marriage at the earliest by the Quran, Sunnah and majority of Muslim jurists.

To remove the misunderstanding of such people, references are quoted in this section from the Quran, Hadith and Fiqh (Jurisprudence).

1.12.1 References from the Quran

The Quran does not promote child marriage but it accepts it to be valid as stated in Chapter Al-Talaq (65:4)

> *"And for such of your women as despair of menstruation, if you doubt, their period (of waiting) shall be three months, along*

with those who have it not. And for those with child, their period shall be till they bring forth their burden", Quran (65:4).

This verse specifies the probation of a divorced woman. The divorce can occur only if there was a marriage. Hence, it is obvious that the girls who have not yet started menstruating can also get married. They can even get divorced.

This verse is further elaboration of the verse in Sura Al-Baqarah (2:228), where the probation of divorced women is declared as 3 states of purity, that is, after completion of three menstruation cycles.

1.12.2 References from Ahadith

Other than the Quran, Ahadith (Traditions of the Prophet Mohammad (PBUH)) make the validity of child marriage known.

"Hazrath Ayesha (RAA) narrates: Prophet Mohammad (PBUH) married her when she was of six years; she was of nine years when she departed from her parent's house (for him)" [22].

One more tradition of Prophet Mohammad (PBUH) discusses similar issue:

"Hazrath Hasan (RAA) narrates: Prophet Mohammad (PBUH) said "If a person arranges the marriage of his son, when the son has not agreed over it, then the marriage is not valid. However, if the son is a minor, then the marriage is valid" [23].

1.12.3 Practice of companions of the Prophet (PBUH)

Statements and the acts of the companions of Prophet Mohammad (PBUH) have got importance in formulation of the laws of Islam.

This section briefs some examples of the child marriage related to them.

Shams-ul-Aima (Principal scholar) Abu Bakr Al-Sarkhi (483H) states:

- Hazrath Qudama bin Mathzoon (RAA) married a girl-child of Hazrath Zubair (RAA) on the day she was born, and said "If I die she is my best inheritor, if I live she is the daughter of Zubair".
- Abdullah bin Omer (RAA) married his daughter to Urwah bin Zubiar when she was a minor.
- One person married his daughter to Abdullah bin Hassan when she was a minor; Hazrath Ali (RAA) held it valid (during his Khilafat).
- Hazrath Abdullah bin Masood's wife married her daughter to Mosaib bin Nakhba's son, when she was a minor. Abdullah bin Masood (RAA) held it valid [24].
- Allama Nowawi states: It is legal for the Wali (guardian) of a child to arrange marriage of the child, if he finds it to be appropriate, since Hazrath Omer (RAA) arranged the marriage of his minor son.
- Ibn Shahab Zahri narrates: Orwah bin Zubair married his minor son to the minor daughter of Mas-ab [25].

1.12.4 Consensus among the Ummah

Allama ibn Munzir states:

> *"Whatever views we received from Ehle-ilm (People with knowledge), from them it can be stated that it is legal for the father to arrange marriage of his minor daughter".*

Saadi Abu Jaib, a scholar of recent times collected the information on this issue. He states that the Jurists are united in validating the marriage of a minor arranged by the father [26].

1.12.5 Hasten the marriage of children when they attain puberty

Hasten the marriage of children when they attain puberty to protect them from falling into sin. Hence, the Quran instructs to arrange the marriage of bachelors (Al-Noor: 32). Various Ahadith also discuss this issue:

> *"....Prophet Mohammad (PBUH) addressed us saying "O! Youngsters! Those who can satisfy the financial rights of wives, they should marry, since the marriage helps in keeping the gaze low and protects your chastity and character (عفت و عصمت)" [27].*

Hazrath Omer (RAA) and Hazrath Anas (RAA) narrate:

> *"Prophet Mohammad (PBUH) said: It is in the Torah that If a person's daughter attains the age of 12 years and if he does not arrange her marriage and if she falls into a sin, then it will be on her father"[28].*

Hazrath Abdullah bin Abbas (RAA) narrates:

> *"Prophet Mohammad (PBUH) said "The one who has son, he should give appropriate name to him, nourish him and educate him, arrange his marriage when he attains puberty. If he attains puberty and his marriage is not arranged, then if he falls into a sin, this sin will be on his father", [29].*

Thus, it is clear that marriage should be arranged at the earliest after the child attains puberty. Muslim jurists have suggested that

when a girl or a boy is meticulously attracted towards opposite gender then it is obligatory (فرض) to arrange her/his marriage.

Hence, Hanafi jurist Allama Ibn-e-Nujaim Misri states [30]:

> *"(If attraction towards opposite gender is severed marriage is a must (واجب)). It means if marriage is not arranged, the subject may indulge into a sin. As there is less probability of a married person entering into sin. Hence, marriage is obligatory (فرض) in some cases and a must (لازم) in some other case".*

The same is stated by Allama Kasani in Badayu-us-Sanaye (2:498) and Allama Haskafi and Allama Shami in Durr-e-Mukhtar (4:63).

Similarly, Allama Ibn-Qudama Hanbali states [31]:

> *"If there is a probability that one may indulge in sin by not entering into the tie of marriage then according to the majority of jurists it a must for him to marry, since it is a must to observe purity and protect oneself from the sin".*

It can also be considered that at young age the boys and girls are more emotional and there is more possibility of entering into a sin. In such situations, stopping them from getting married is equivalent to forcing them to indulge in wrong.

1.13 SUMMARY

To summarise, Islam does not promote the child marriage simultaneously it does not prohibit early marriage. It is proved from the Quran, Hadith, companions' acts, and the consensus of Ummah. This permission is based on the wisdom. However, the marriage should be hastened once the child attains puberty. This is required to protect moral values and character. Hindering the

marriage is not appropriate for a healthy society. It is also a truth that the custom of child marriage among Indian Muslims is less compared to that of Hindu brothers. Further, in Islam, through the right of puberty, child marriage can be dissolved.

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CHAPTER 2

THE ISSUE OF POLYGAMY

2.1 INTRODUCTION

The word ‘polygamy’ is derived from a Greek word ‘polygamia’, means "state of marriage to many spouses" or "frequent marriage" is a marriage that includes more than two partners. When a man is married to two or more women at a time, the relationship is called ‘polygyny’; and when a woman is married to more than one husband at a time, it is called ‘polyandry’ [1].

The polygamy is among those social issues which are in discussion since the pseudo-movement of women’s liberation and independence. This issue has been at the top among those issues which are raised unjustly against the Islam by westerners.

By nature a man believes what he frequently and repeatedly listens from various people even if it is totally wrong and absurd. Hence, the western world has extensively written against polygamy such that even Muslims become doubtful about its validity. Especially, those Muslims who get educated in the western world they feel shy of themselves on this issue.

The issue of polygamy should be focused in the light of religion, society and morality.

2.2 THE HISTORY OF POLYGAMY

Polygamy has been practiced for many centuries by cultures from all over the world [2].

- The Hebrew society has partially accepted polygamy
- It happened in the classical China too.

- The polygamy was also encountered periodically at the Native Americans, in the West African continent, Polynesia, India and the ancient Greece.
- The polygamy was widely accepted throughout the world until the Roman Empire and the Roman Catholic Church has imposed the rules of having just one wife, but multiple other lovers were the norm.
- The polygamy was widely accepted during the last two thousand years in the Sub-Saharan Africa.

2.3 POLYGAMY IN HINDUISM

From the religion point of view, it is a fact that every religion of the world has permitted polygamy. Both polygamy and polyandry are permitted in the religious books of Hinduism [3].

Both polygamy and polyandry were practiced in ancient times among certain sections of Hindu society. Polygamy was practiced by warrior castes, rich merchants, and feudal lords. Historically, Kings occasionally took concubines. Polygamy was a matter of personal choice, a status symbol and at some times social, moral and religious obligation. When polygamy served such ideals, Hindu law books (Dharma-Shastra) made provisions for polygamy and did not object to this practice [3].

The Laws of Manu, i.e., the Law Book of Mankind, is the ancient Vedic scripture upon which Hindu laws under the British rule were formulated. It is clearly specified in the Laws of Manu that:

All classes, including the Brahman class, are allowed to have more than one wife. A Brahman can have four wives:

- First wife should be from a Brahman family

- Second wife can be from either Brahmin family or Kshatriya.
- Third wife can be from Brahman, Kshatriya or Vaishya.
- Fourth wife can be from any class, including that of Shudra.

Vedic scriptures have stories of many Brahman sages who are said to have more than one wife.

Polygamy was liberally practiced in ancient Hindu society. An address by Bhishma to King Yudhishthira in the Mahabharata concisely supports this fact [4]:

> *"A Brahmana can take three wives. A Kshatriya can take two wives. As regards the Vaishya, he should take a wife from only his own order. The children born of these wives should be regarded as equal" [5].*

Dr. Malik Ram, referring to the Rig Veda, states that it is legal for a man to marry more than one woman at a time. As, in Hindu religious books, the instructions regarding multiple marriages are found frequently.

Aitareya Brahma:

> *"One man can have multiple wives but a woman cannot have multiple husbands".*

Apastamba:

> *"If a man has a wife who has wish to fulfil her religious responsibilities and has ability to perform them, who can give birth to sons, then in this situation he cannot marry another woman. If any one's wife is not capable of fulfilling any one of these responsibilities, then it is legal for him to keep a second wife, but before that he should lit the fire (Agni-hooter)".*

Devala:

"A Shudra is permitted to keep one wife, a Vaishya is permitted to keep two, a Kshatriya is permitted to keep three and a Brahman is permitted to keep four, but a king can keep any number of wives he wills"-

Gautama:

"For a Brahman three wives, for a Kshatriya two wives, for a Vaishya only one wife is permitted. If the husband of a woman has disappeared, she should wait for 6 years, if he is found she should go back to him".

Mahabharata:

"The deity, Vasu Dev, who appeared in this world, had 16,101 (Sixteen thousand one hundred and one) queens. Among them 8 (Rukmini, Jamvati, Charvahasi etc.,) were famous", (4:15).

Vishnu Purana:

Nine wives of Sri Krishna listed by Vishnu Purana are:

i. Rukmini
ii. Satyabhama
iii. Jambavati
iv. Kalindi
v. Mitravinda
vi. Nagnajiti
vii. Madri
viii. Lakshmana
ix. Rohini

. ...other than these Sri Krishna had 16,100 (sixteen thousand) queens".

Taittirya Sanhita:

"One man can have two wives, as there can be two cords tied to one stick of 'Yegya'. But a woman cannot have two husbands as one stick of 'Yegya' cannot have two cords tied on it".

Baudhayana:

"A man can marry more than one woman if the first wife is insolent".

Vishnu:

"According to the organisation of the casts, one Brahman can have four wives, a Kshatriya can have three, a Vaishya and a Shudra can have one wife each. If a man has more than one wife of his caste, then the eldest wife (the wife who has married to him the earliest) should be asked to perform the religious duties".

Ramayana:

"Sri Rama Chandra's father, Maharaja Dasrath, had three wives. One was Kausalya who was the mother of Sri Ram, second was Sumitra who was the mother of Sri Lakshmana, third was Kaykayee who was the mother of Bharat".

Mahabharata:

"Raja Pandav had two wives. One was Kunti, Arjun was among her children. Second was Madhuri, Sahdev was among her children".

Gustav Le Ban (French Historian):

Gustav Le Ban, a French historian says:

"In India there are various societies where polygamy is prevailing. Among them is the Rajput's society. Among several wives, the eldest has got priority. In olden days the wife used to get burnt along with the husband's funeral. Sometimes wives used to conflict to decide who shall have the prestige to burn on husband's death. For the kings custom was to burn all his wives on his death. In Udaipur, the tomb of Sangram Singh and his 21 burnt wives is present",[6].

2.4 POLYGAMY IN JUDAISM

The old testament of the bible is called as Torah. It speaks of various incidents of the prophets with multiple wives, which gives us evidence that the practice had long been an accepted social institution. Torah laws concerning marriage were given to the Israelites at Sinai, around 3500 years back. Though the Torah does not clearly specify the limit on the number of wives, however according to the Talmud, the right to plurality of wives is accepted, but the number of legitimate wives is limited to four. In the Patriarchal age (Male dominating period) polygamy was regarded as an unquestioned custom [7].

Polygamy was such a well-established part of the social system that Mosaic Law is not even critical of it. It states [8]:

- If a man takes a second wife the economic position of the first wife and of the children she bore must be secure; and,
- In case of inheritance, no child of a subsequent marriage is to be preferred over a child from the first wife.
- The high priest could have only one wife.
- A king in Israel should not have too many wives.

2.4.1 Incidents of polygamy specified in Torah

There are several examples that can be cited from the Torah on polygamy.

Example1: In Torah, three wives of prophet Abraham (PBUH) are specified.

- Sarah (11:29),
- Hager (35:1-2),
- Qattara (35:1-2).

Example 2: Prophet Jacob (PBUH) had four wives as per Torah. They were (20:29):

- Leah
- Zulfa, i.e., slave girl of Leah
- Rachel
- Balhah, i.e., slave girl of Rachel.

Example 3: Prophet Moses (PBUH) had two wives as per the Torah.

- Sephora, the daughter of Prophet Shoaib (PBUH) (2:21).
- His second marriage was with a Koshi lady (1:12).

Example 4: Prophet David (PBUH) had eight wives (Samuel:1,25):

- Michal, the second daughter of King Saul
- Ahinoam the Jezreelite
- Abigail the Carmelite, previously wife of Nabal
- Maachah, daughter of Talmai, king of Geshur
- Haggith
- Abital
- Eglah

- Bathsheba

An extraordinary number of wives and concubines have been attributed to Prophet Solomon (PBUH) [9]. Kings James Bible states:

> *"And he (King Solomon) had seven hundred wives, princesses and three hundred concubines".*

Presently, in Europe, polygamy has almost disappeared from the Jewish society. However, in the Muslim world Jews continued the custom till recently. It was only with the congregation of Jews to the (illegally formed) state of Israel that the custom was finally made universally unacceptable [7].

2.5 POLYGAMY IN CHRISTIANITY

Jesus had come as the preacher of the Moses law to the people of his era. Hence, he neither condemned polygamous unions nor advocated a change in the system. From this non-intrusive attitude, Luther, in the late 16th century, arrived at the conclusion that the polygamy could not be forbidden [7].

Christianity is based on the teachings of Bible (Old and new testaments). By itself it does not have an independent law but depends on the laws formulated by the Torah (Old testaments of the Bible). Hence, it is concluded that even Christianity permits polygamy.

Shaikh Mahmood Aqqad Writes: The church favoured polygamy till 17th century.

The expert of the subject "Polygamy in different societies", Vaster Marc states that the Church and Government both had favoured polygamy till the mid of 17th Century, and polygamy was mostly prevailing in their society at extreme" [10].

Nowhere polygamy is prohibited by the Gospels. For example, for a groom, 10 virgins are specified:

> *"On that day, the kingdom of the heavens will be like those 10 virgins who have lit their torches to welcome their husband"*[11].

Though the Church was initially against polygamy but the decision was changed soon. As per Dr. Malik Ram:

> *"Finally the Church has to accept defeat: During 1650 in Germany's city Nuremberg, there was a conference of Christian jurists. The proposal of 'a man can marry two wives' was accepted and publicised"* [12].

In the US, polygamy was allowed in the early years of the history of The Church of Jesus Christ of Latter-day Saints (LDS Church). Officially it was the year 1899 when the members of this church were stopped from being polygamous. There were still few sects that isolated themselves from the LDS Church and continued to practice the polygamy. This happened when the polygamy was declared to be an illegal practice in the US [2].

2.6 POLYGAMY AMONG ARABS BEFORE THE ADVENT OF ISLAM

Every religion of the world has kept polygamy a legal act. In Arab, before the advent of Islam, there was no limit on the number of marriages. When Hazrath Ghelan Saqfi became a Muslim, he had 10 wives. The Prophet (PBUH) instructed him to retain only four and leave the remaining [13].

Similarly, when Hazrath Naufil bin Maaviya became Muslim, he had 5 wives. The Prophet (PUBH) instructed him to retain four and leave the remaining [14].

Haris bin Qais Narrates: I had 8 wives when I became Muslim. When I discussed this with the Prophet (PBUH) he suggested me to retain four and leave four [15].

2.7 THE CONCEPT OF POLYGAMY IN ISLAM

Though Islam permits polygamy but three important points are to be remembered here:

a) Primarily, Islam has permitted polygamy but has not encouraged it. It is legal but not preferred. During the period of Prophet (PBUH), there were many battles due to which several widows and orphans were left. Hence, the companions of the Prophet (PBUH) had more than one wife. Even the Prophet (PBUH) had married more than once with the purpose of propagating Islam, sheltering widows and orphans. However, Muslim jurists have favoured the concept of only one wife. Allama Burhan Uddin Marghenani (530-953H) states:

"If a person has one wife and is willing to marry another and if he doubts whether he will be able to do justice between both, then second marriage is not legal for him. If he is sure that he can do justice then the second is permitted. Even then if he avoids second marriage he shall be rewarded as he has protected his wife from sorrow. Similarly, if a woman wants to be the second wife, it is legal for her, and if she avoids doing so, then, she shall be awarded [16].

b) Secondarily, the Quran has limited the number of wives to four and has permitted to marry maximum four.

" فَٱنكِحُواْ مَا طَابَ لَكُم مِّنَ ٱلنِّسَآءِ مَثۡنَىٰ وَثُلَٰثَ وَرُبَٰعَۖ فَإِنۡ خِفۡتُمۡ أَلَّا تَعۡدِلُواْ فَوَٰحِدَةً أَ "

> *"Marry of the women, who seem good to you, two or three or four; and if you fear that you cannot do justice (to so many) then one (only)", Sura Nisa (4:3).*

Thus, there is no possibility of keeping more than four wives at a time. Moreover, this permission is conditional. It means if a person can fulfil his responsibilities properly towards more than one wife, then he can marry more than once, otherwise not.

The person who does not do justice among two wives is warned by the Prophet (PBUH).

> "*If a person has two wives and does not do justice between them, then one of his upper limbs will be paralysed when he comes on the day of judgment"* [17].

If a person is not maintaining justice among wives, then the sufferer can approach a court to claim justice. She can even claim the dissolution of marriage in such a case.

Fig. 2.1 shows percentage of polygamy in comparison to the percentage of Muslim populated for some of the countries.

c) Third reason for permission of polygamy is the imbalanced ratio between men and women. In most of the accidents and wars men die and the number of women left are more. For instance:
   - During First World War (1914-1918) 80 lakh soldiers died, other than common citizens.
   - During Second World War (1939-1945) six and a half crore men were either dead or disabled.
   - Germany was leading this war. Hence, during 1920-1940 the ratio of men and women in Germany was 1:3.

- In 1900 census of France, 4,23,709 women were more than men.
- According to the Census of Australia (1890) 6,44,796 women were more than men
- Iraq-Iran War (1979-1988) left 1,00,000 widows in Iraq and 82,000 widows in Iran
- In 1987 Census of U.S.A 80,00,000 women were more than men
- In traffic and industrial accidents men suffer more than women
- 90% of the criminals and prisoners are men
- In most of the countries, men are born less than women

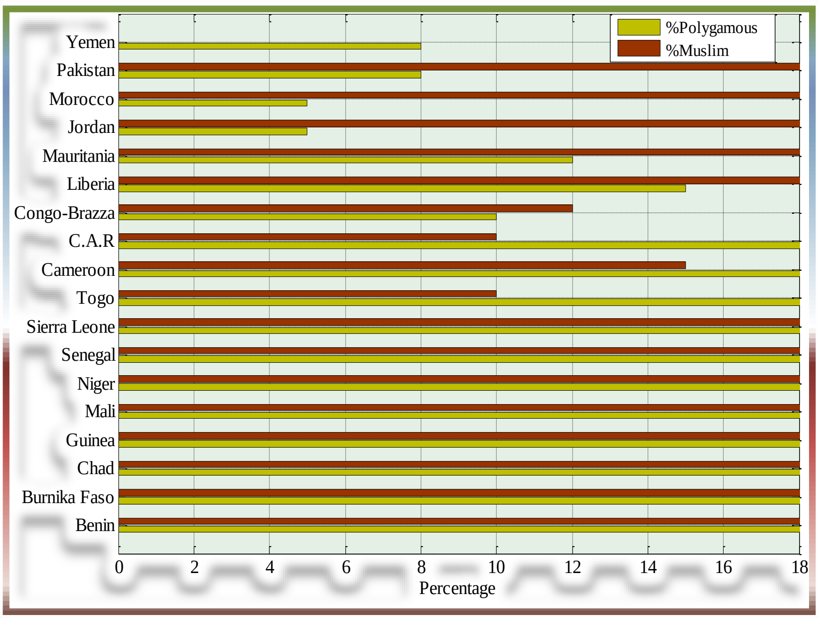


Fig. 2.1 Polygamy in Arab countries presently
Source: Demographic & Health Surveys

2.7.1 The gender ratio

People say that the gender ratio throughout the world indicates more men than women. Let us clear this misunderstanding. At the time of birth men are little more than women and the average number of men compared to that of woman throughout the world is little more. However, the life expectancy of men is less than that of women. Hence if the gender ratio is estimated for senior citizens, around the world, it can be noted that the women are approximately 20% more than men.

Extensive research is done worldwide on human gender ratio. More than 1000 research papers are found available in open literature [18]. The major conclusion of this research is, at birth men are more than women. However, as the age advances the number of men gradually decreases compared to that to women because of various reasons. Sex ratio in 2013, by country for total population, at birth, is shown in Fig. 2.2. Pink represents more women, purple more men, and green indicates their equal number. The world average ratio (2013) for senior people is 0.79 men with respect to women. In some of the Asian countries, like India and China, female genocide is at extreme, hence, males have become more than females.

There is no doubt that there are countries where men are more than women. Consequently, men can marry only one woman to the maximum and polygamy is not an issue. If women are more than men and polygamy is not permitted, then the women will have to suffer with lonesomeness, hence in this case polygamy becomes the necessity of the society.

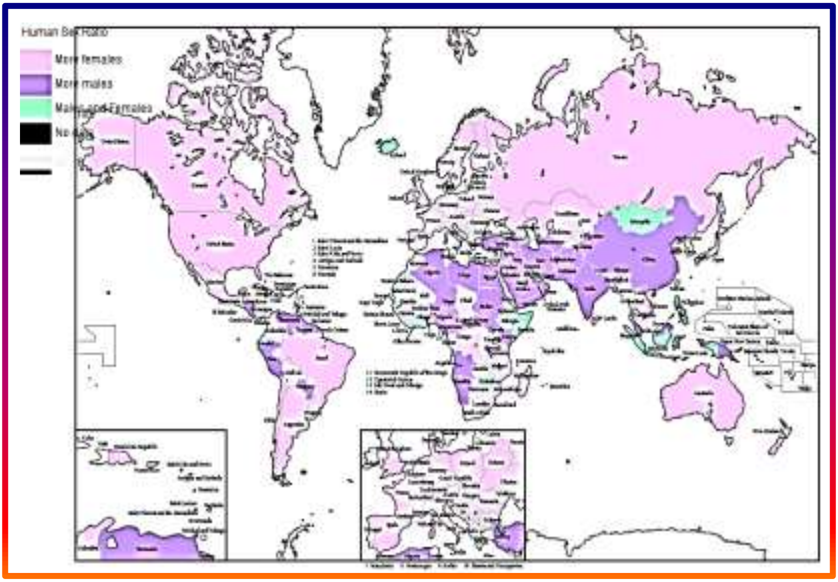


Fig. 2.2 Human gender ratio (2013)

2.7.2 Life expectancy

Life expectancy is increasing day by day nationwide as well as worldwide for men as well as women. It will continue to increase in future as shown in Fig. 2.3. Increasing life expectancy in India[19] is shown in Fig. 2.4.

This increase is due to better hygienic conditions, better food, and medicine availability and the advanced techniques for treatment. However, life expectancy is increasing for men as well as women, but life expectancy for women throughout the world [20] is always more than that of men (Fig. 2.5). Consequently, the number of women will be more in the world than men. Hence, life expectancy is one more logical reason for the validity of polygamy.

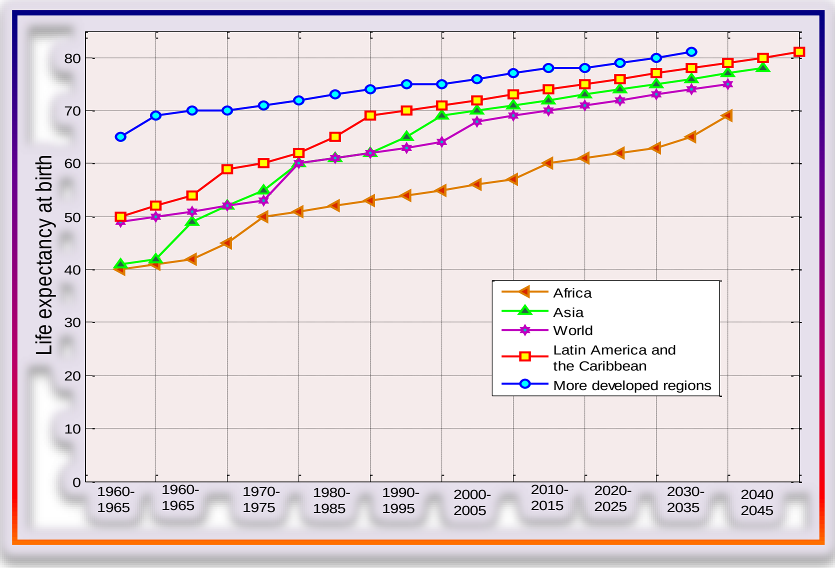


Fig. 2.3 Life expectancy at birth by region 1950-2050
Source: UN world population prospects, 2006

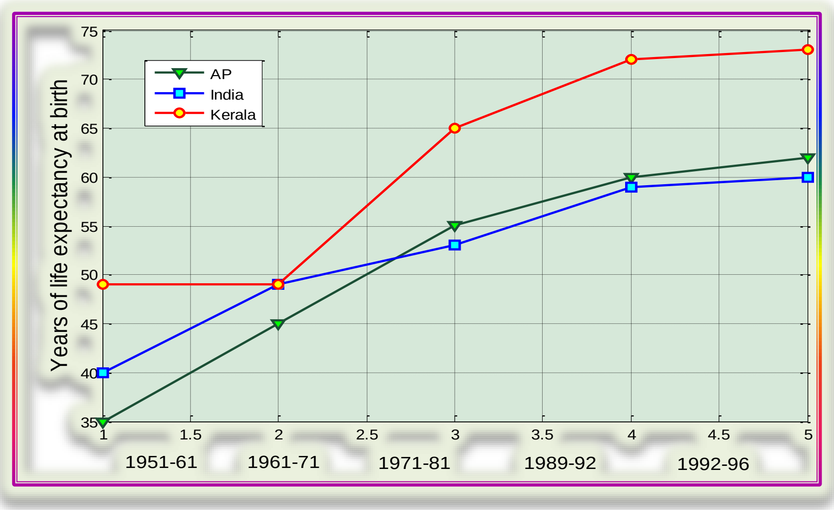


Fig. 2.4 Life expectancy in India

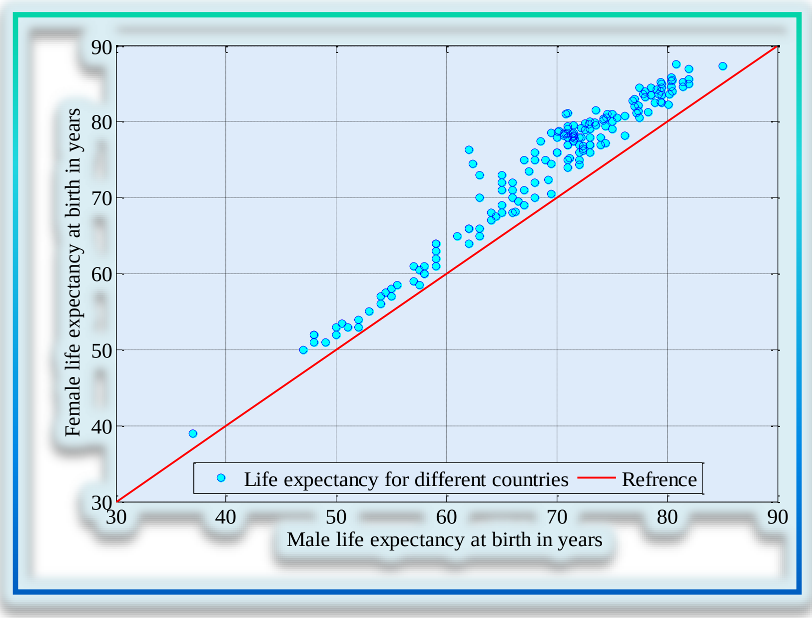


Fig. 2.5 Life expectancy for men and women worldwide

2.8 POLYGAMY FROM THE MORALITY POINT OF VIEW

The major reason behind the concept of polygamy is the protection of chastity and morals. Attraction towards the other gender and connubial necessities are found even in animals, but there is no question of maintaining chastity or character among them. It is the only human society where the morality is of utmost importance. Men and women enter the tie of marriage and live together by being faithful to each other. Such morality and faithfulness cannot be expected from animals. Because of this inherent morality in human beings, a man cannot tolerate keeping such relation with a sister, mother, daughter etc.

Whenever the law of polygamy was made impracticable, the illegal ways of connubial relations were opened. The Roman and Greek civilizations had prohibited polygamy. Consequently, men in their society were indulged in keeping unlawful relations with several women at a time [21]. These unlawful relations were not debarred [22].

Thus, even a just non-Muslim intellectual admits the facts regarding polygamy. One subject expert Dr. Gustav Li Ban writes:

> *"In western countries, the custom of single wife is only in the books. I believe and even no one denies that the custom of one-wife does not exist in our society in true sense. I do not understand why the custom of polygamy among easterners is considered inferior to the custom of keeping illegal wives among westerners. I should say the former is much superior over the later"*[23].

Dr.Malik Ram was among the intellectuals with realistic thinking. He writes:

> *"Polygamy can be favoured through various examples. For instance, number of women is more than that of men in the world. If rule is made for a man to marry only one woman, where the other women will go? Are we not opening the doors for illegal ways of relationship among these unmarried women and the married men...If we don't permit these women to marry, we are forcing them to indulge in wrong, losing their self-respect and spoiling their character. Her sentiments exist by nature. If she is not permitted by the society to go for the marriage, then she will certainly revolt the existing customs*

and laws. Consequently, the society will lose its temperament and the presence of illegal children shall be accepted legal.

The selection of the path is on you. On one side, you can make a woman your respectable wife, an owner of the house and a respectable mother. On the other side you can make a woman a broken personality or a disreputable prostitute spoiling the image of the society" [24].

Therefore the provision for polygamy is among the necessities in a moralised and pure society. This is not a theoretical philosophy. The immoral and unchaste society of the west has become a practical example.

2.8.1 Decline in marriage rate in the western world

The decline in marriage rate is almost universal. United Nations statistics on marriage trends shows that 87% of the world's population lives in countries with marriage rates that have fallen since 1980s. Fig. 2.6 shows the decline in the trend of the marriage rate since 1940, with some expected scenarios till 2040 [25].

The Fig. 2.7 shows percentages of ever married (that is, including separated, divorced and widowed) by age for cohorts born from 1930 to 1990 (using IPUMS data) [25].

The steps downward from back to front show that, at each age, successive groups are less likely to have been married. By 2010, 87% of about 50 year old, those born around 1960, were ever married. Hence it can be concluded that the decline is pronounced, that 87% is down from 95%. Thus, marriage is being both delayed and foregone, although to different extents.

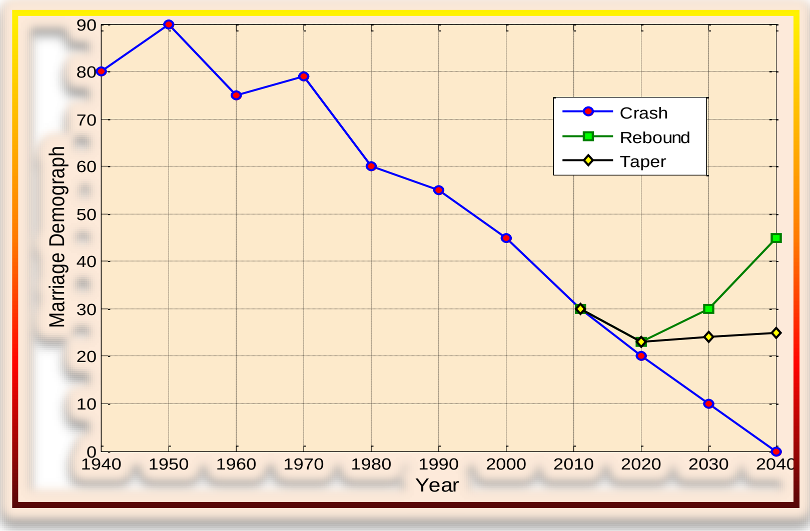


Fig. 2.6 Decline in marriage rate (US)

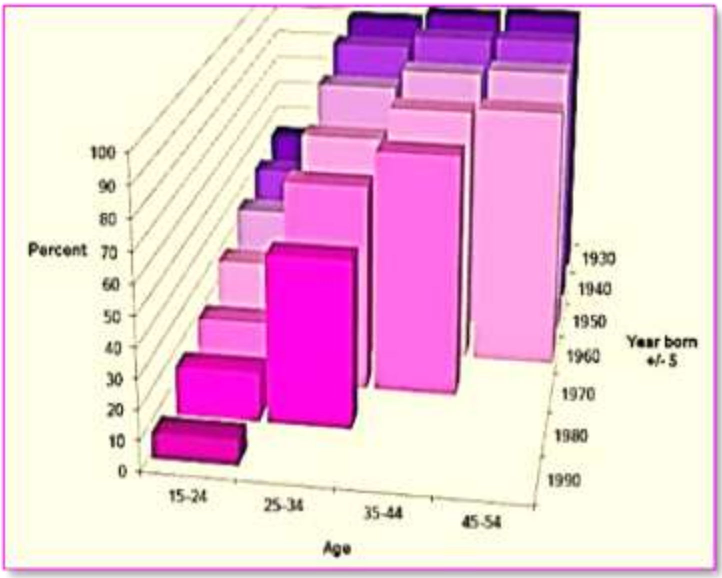


Fig. 2.7 Percentage of US women married by birth cohort and age

2.8.2 Cohabitation

Fig. 2.8 shows recent increase in the cohabitation rate in US [26]. A newspaper of US states that in US among (USA Today, dated April 11, 2012):

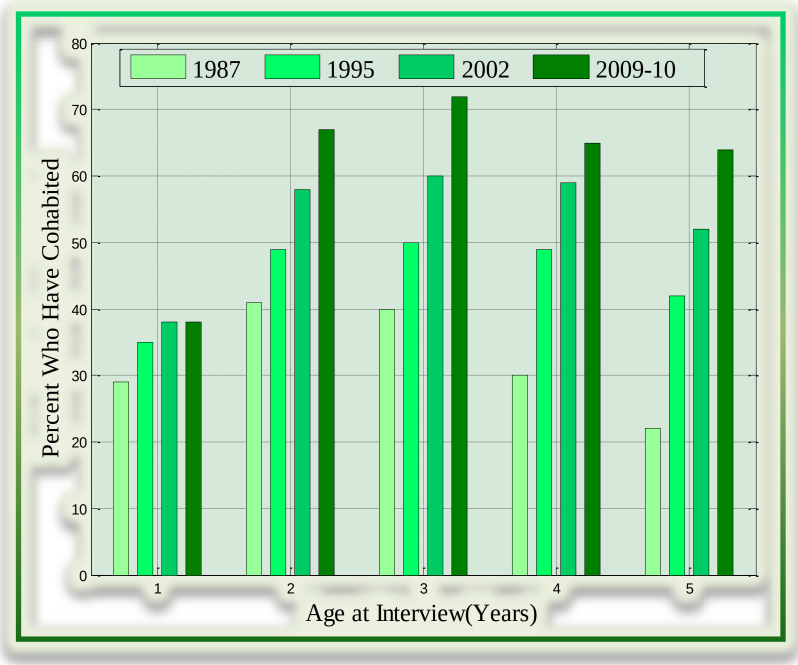


Fig 2.8 Increase in cohabitation in US

- **Black women:** 80% of first children born were illegitimate; 18% of these women were cohabiting.
- **Hispanics:** 53% of first children were illegitimate, and 30% of the women were cohabiting.
- **White women:** 34% of first children illegitimate, 20% to cohabiters.
- **Asian women:** 13% of first children were illegitimate; 7% of women were cohabiting.

A newspaper of UK states [27]:

- In UK, the unmarried couples with children have become same numbered as that of married couples in (Fig. 2.9).

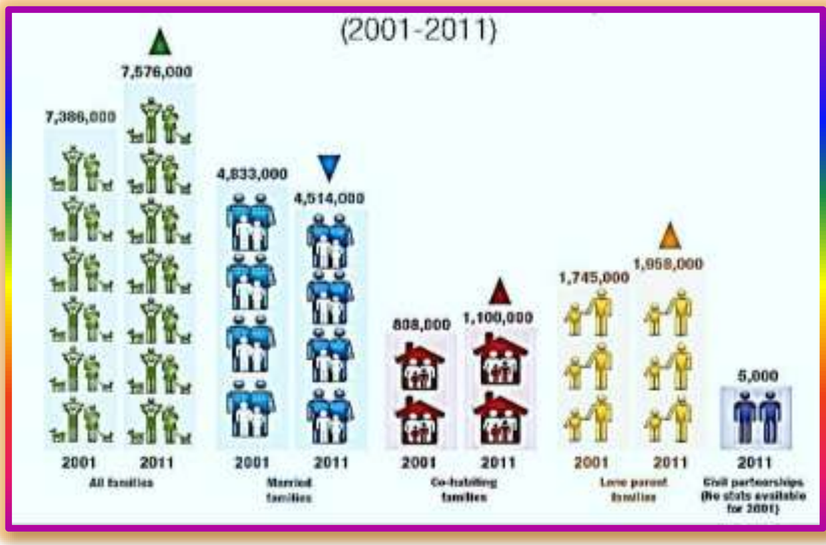


Fig. 2.9 The increase in cohabitation in UK

- UK survey reports conclude that living together is no more a 'trial run' for marriage and children.
- Official figures show that married couples are much more likely (i.e., 75%) to stay together, compared to that of cohabiting couples (i.e., 25%).

2.8.2.1 Years of cohabitation

A survey is performed in US to find out for how many years usually men and women cohabit with one partner [28]. The following details are collected (Fig. 2.10).

- 65% of the males and 42% of the females cohabit for less than one year.
- 37% of men and 23% of women cohabit for less than three years.
- 15% of the males and 0-10% of the females continue to cohabit for 5 years.

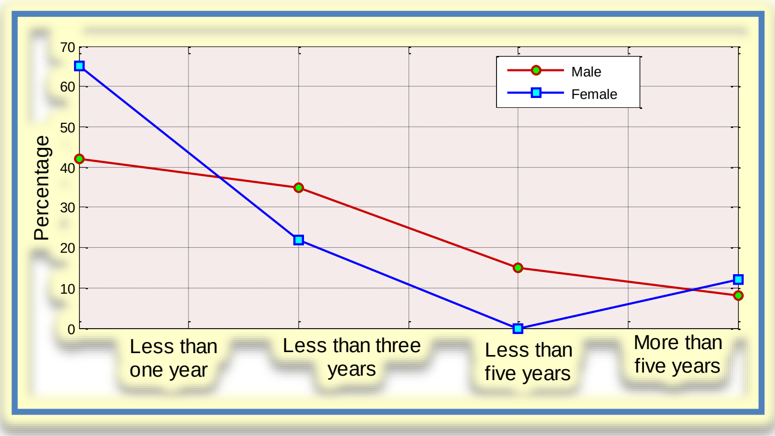


Fig. 2.10 Years of cohabitation with one partner in US

2.8.2.2 Number of cohabiting partners on the average

During a survey in US, it was tried to find out with how many number of women a man cohabits in his life [28]. It was found that (Fig. 2.11):

- Males have had more experience with different partners than females.
- Men are found more liberal than women.
- It can be connected with male's inclination towards cohabitation, since males do not have to worry about the family responsibilities.

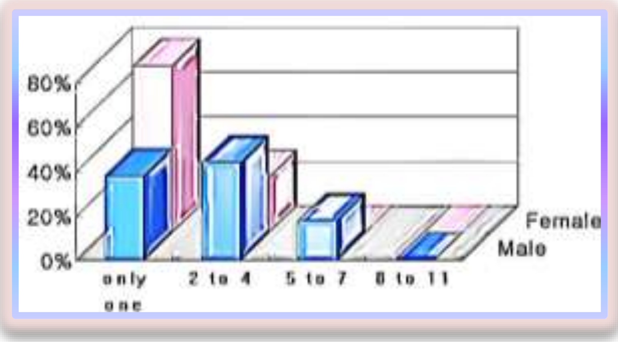


Fig. 2.11 Number of cohabiting partners in US

If males keep on leaving women after they bear children out of wedlock, and keep searching for new women to make them bear children, without taking any responsibility of any family, automatically it becomes the necessity of women to keep searching new partners to cohabit with them. Hence, it has become common in the western world for men and women both to cohabit with multiple partners and keep on giving birth to illegitimate children.

The reader should pause for a moment here and think whether the conditional polygamy permitted by the Islam is better or making almost every woman of the society a prostitute for almost every man is better. Marriage gives social, financial and moral security to the women. It protects the dignity and chastity of a woman. Instead, the cohabitation has snatched everything from women and from their illegitimate children, including social respect, dignity, health and peace of mind.

2.8.3 Births to unmarried women

According to a study sponsored by the Robin Hood Foundation, American taxpayers spent nearly $7 billion in 1996 to deal with

the social problems resulting from births by unwed girls under the age of 18. From Fig. 2.12 it is obvious that by 1999 the percentage of births to unmarried women (of all ages) is approximately 40% in US. Chapter 1 has provided details on this issue.

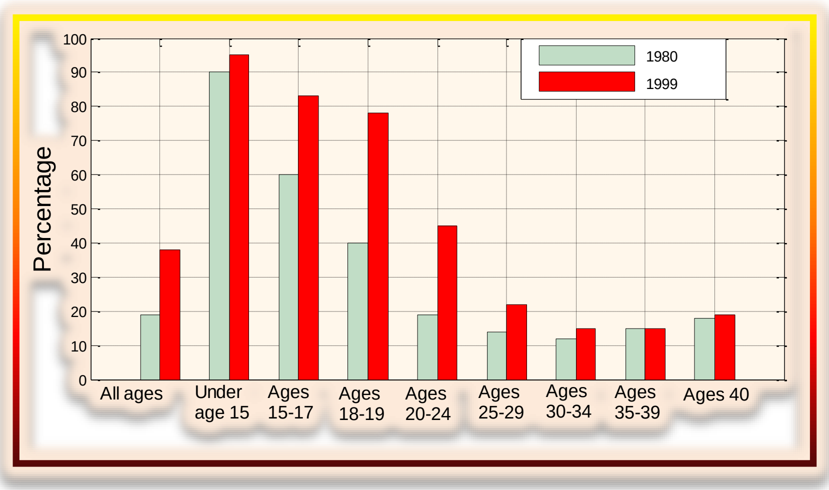


Fig. 2.12 Percent of all births to unmarried women
Source: National Vital Statistics System

2.8.4 Violent crime with unmarried women and their children

The unmarried women are not given any respect in the society. The so-called partner does the crime of being violent with her, treating her as a prostitute and even worse than that (Fig. 2.13). In 2001, according to the American Association for Single People (Glendale, CA), thirteen states refer to children born out of wedlock as "bastards"[29].

When men are questioned the reason for not marring the women with whom they cohabit, and have got new-borns out of the relation they have, the response was multi-coloured.

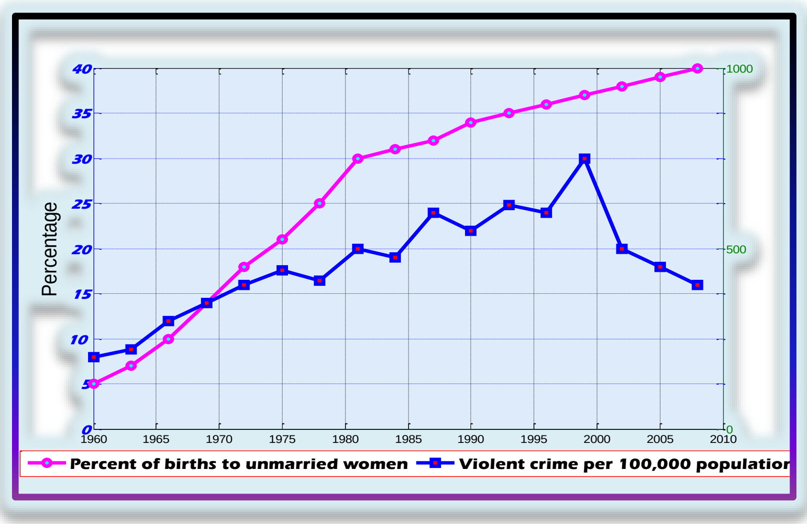


Fig. 2.13 Births to unmarried mothers and violent crime
Source: FBI, Uniform Crime Reporting (UCR)

From the statistics of the Fig. 2.14 it is obvious that men just want to enjoy their life, leaving the women and children without any social, financial or moral support [30]. ***In the name of women's liberation, it is the man who has liberated himself from the responsibilities.***

Finally, it is a woman who suffers and her illegitimate children without father. This is the western culture. The so called liberal people want the same culture to be spread throughout the world. They want every woman to carry illegitimate children and struggle all alone for herself and her children, in the name of women's liberation. They want every man to be out of wedlock, totally liberal to spoil the dignity and chastity of every woman, make her life absolutely miserable. Western culture does not want the women to be dignified with titles such as mother, sister, wife and daughter. When the children do not get the name of the father,

and when the race is not established, then, who understands which girl is the sister of which boy? They want every woman to fulfil their carnival desires, without asking for any rights. They want carnival relation to continue even with their real sisters, mothers daughters etc. This is the horrifying picture of the existing western world, worse than that of animals and beasts.

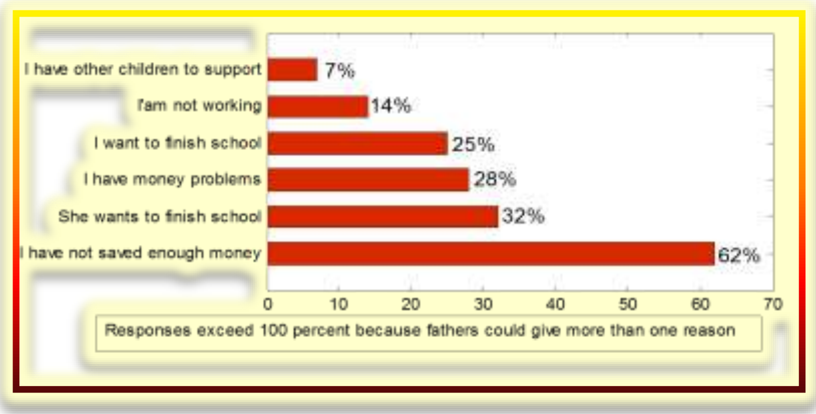


Fig. 2.14 Survey done on unwed fathers who cohabit

2.8.5 Single-Mother concept worldwide

The number of single mothers is increasing worldwide. They need to earn for themselves and also for their children. Statistics show that this problem is at extreme in Japan. Characteristic of single mothers in Japan is that their work participation rate is the highest in the world, far exceeding the majority of other major industrialized countries (Fig. 2.15). In the early 1990's, 87% of the Japanese single mothers (including widows as well as divorced and unmarried mothers) were working. Even more striking is the fact that their work participation rate has been over 80 percent for the entire post-war period.

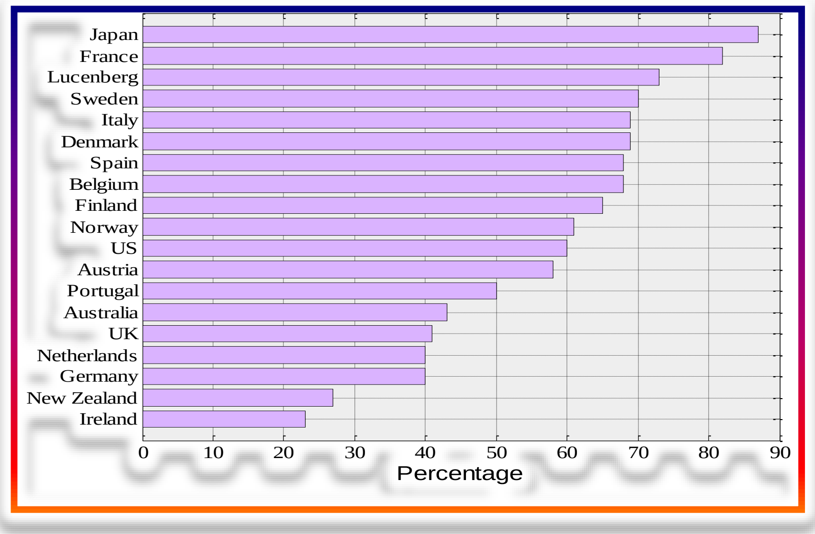


Fig. 2.15 Single mother work force participation rate (1990s)
Source: Family policy Study Centre, London

2.8.6 Poverty of children born out of wedlock

Child poverty is an ongoing national concern in US. The principal cause of poverty is the absence of married fathers at the home. Fig. 2.16 shows the decline in percentage of children born to married parents in US from 1929 to 2010.

Fig. 2.17 shows the increase in the percentage of children born to un-married parents in US from 1929 to 2010.

According to the U.S. Census, the poverty rate for single parents with children in the United States in 2009 was 37.1% (Fig. 2.18). The rate for married couples with children was 6.8%. Being raised in a married family reduced a child's probability of living in poverty by about 82%.

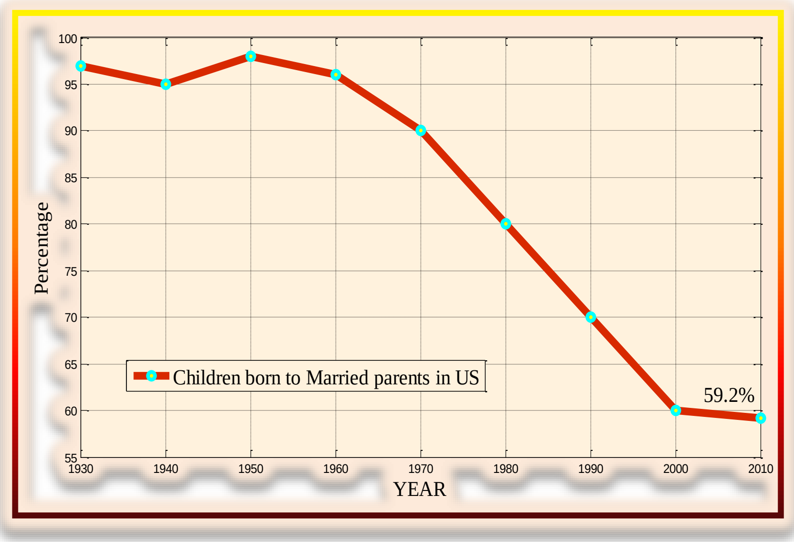


Fig. 2.16 Percentage of children born to married parents in US
Source: US Census Bureau and National Centre for Health Statistics

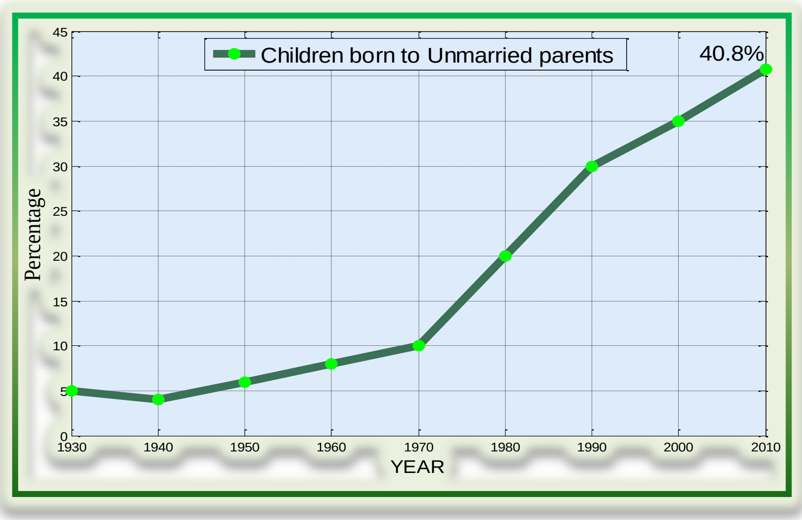


Fig. 2.17 Percentage of children born to un-married parents in US
Source: US Census Bureau and National Centre for Health Statistics

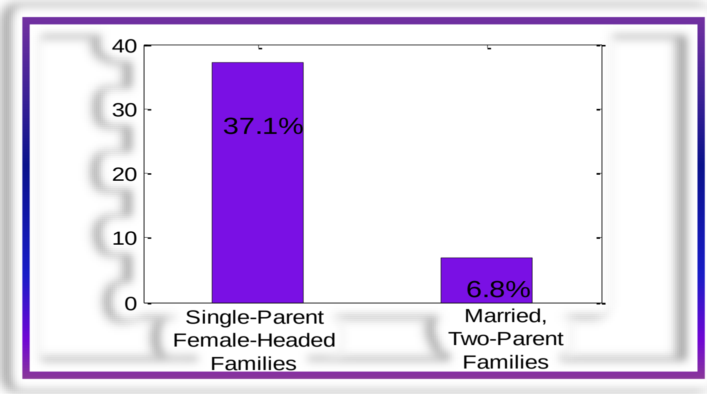


Fig. 2.18 Percentage of single-parent families with poor children
Source: US Census Bureau and American Community Survey

Fig. 2.19 shows that in US 71% of poor families with children is unmarried.

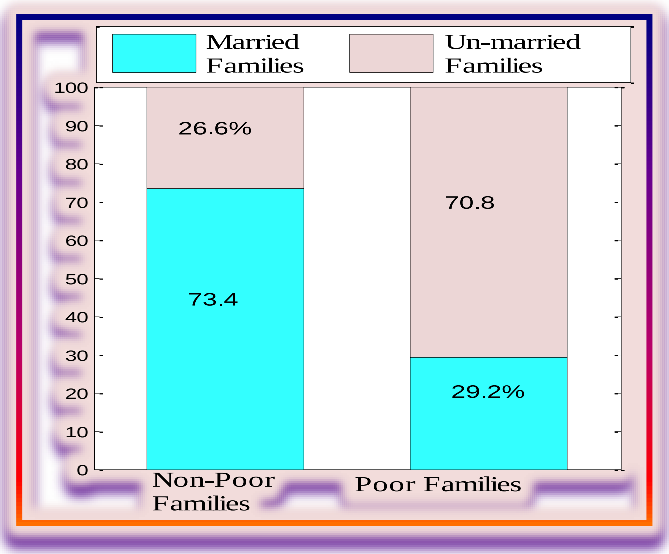


Fig. 2.19 Unmarried poor families with children
Source: US Census Bureau and American Community Survey

Based on these surveys, government of US strongly recommends for marriage, to protect women as well as their children from poverty, lack of education and for their proper nourishment.

2.9 A MERCY FOR WOMEN

A glimpse of hardships faced by single-mothers [25] is shown in Fig. 2.20. The single mothers face several hardships throughout the world. If there are sincere men who can tie themselves with such women in wedlock and fulfil the responsibilities, will not the life of such women become paradise?

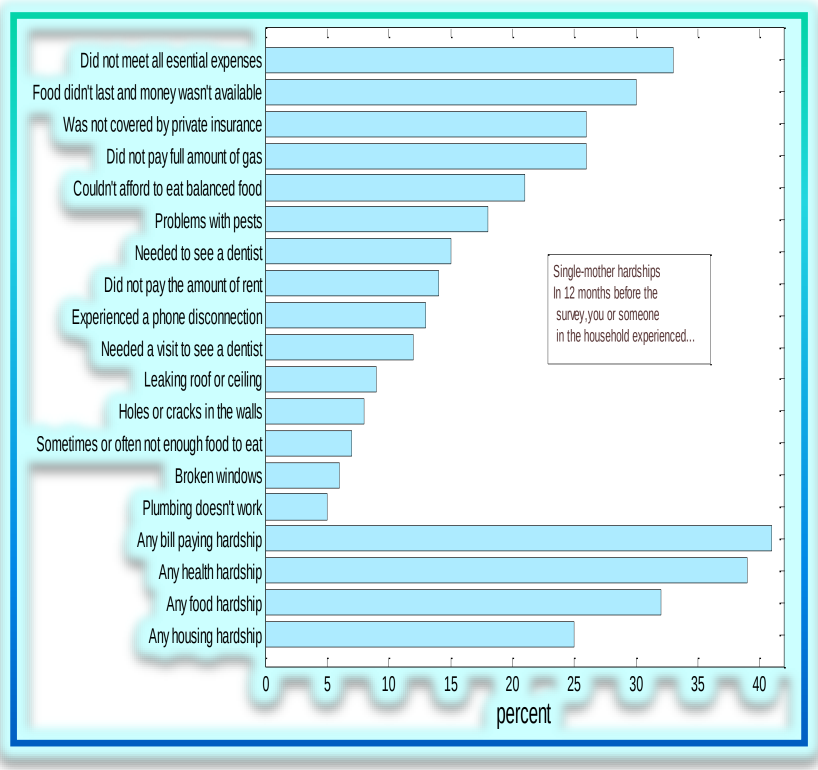


Fig. 2.20 Single mother hardships

The problem of widows and divorcees can be solved better if polygamy is made legal. The single-mother concept is prevailing at mass level in the western world. The single mothers and their children can be given shelter if marriage and conditional polygamy is encouraged.

One aspect in polygamy is the mercy for woman. If a woman is permanently ill, or if she is not able to give birth to children and if the husband is willing to go for another marriage, in this case if polygamy is not permitted, then the husband will either divorce the wife or he may try to have another wife which is not legal as per the law of the society. The second wife certainly blackmails the husband, as she is illegal. She can even harm the first wife. In such situations, the polygamy is the only solution.

The polygamy can exists if other woman agrees for it, since no woman can be forced to become second wife. Women themselves should agree for polygamy as men are always less than women. Would woman like to be a respectable wife of her husband or would she like to be the illegal spouse of several men throughout her life. In later case she cannot avail the benefits that she could have from her legal husband.

2.10 POLYGAMY IN PRACTICE WORLDWIDE

In the global context, acceptance of polygamy is common [31]. Fig. 2.21 shows polygamy in practice worldwide. Where ever the polygamy is made illegal, there the illegitimate relations are found numberless.

According to the Ethnographic Atlas, of 1,231 societies noted, 186 were monogamous; 453 had occasional polygyny; 588 had more frequent polygyny; and 4 had polyandry [32]. At the same time, even within societies that allow polygyny, the actual

practice of polygyny occurs unevenly. There are exceptions: in Senegal (a country in Africa), for example, nearly 47 percent of marriages are multiple [33].

Fig. 2.22 shows prevalence and legal status of polygamy [34]. Within polygynous societies, multiple wives often become a status symbol denoting wealth, power, and fame.

Polyandry (Multiple husbands) is more than the figure commonly cited in the *Ethnographic Atlas* (1980). The atlas has listed only those examples found in the Himalayan Mountains. More recent studies have found 53 societies outside of the 28 found in the Himalayas, which practice polyandry [35].

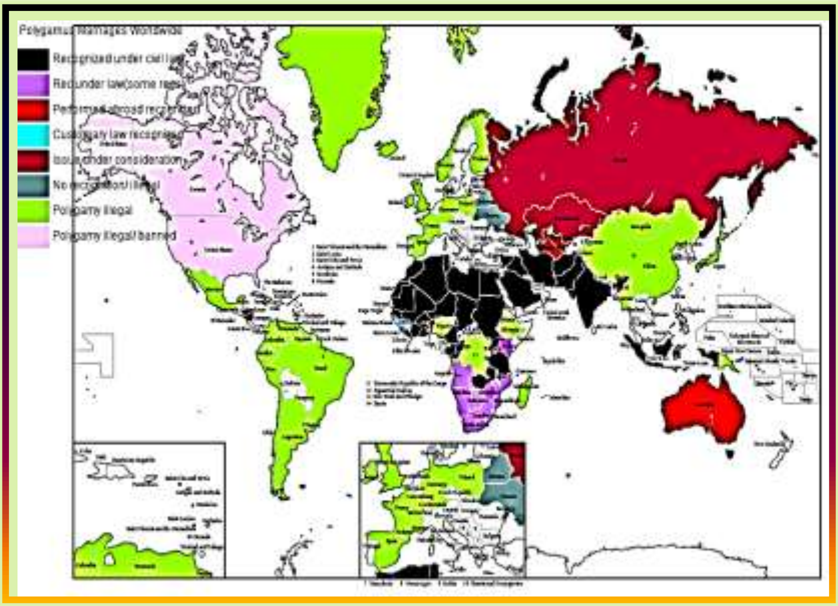


Fig. 2.21 Polygamy in practice worldwide

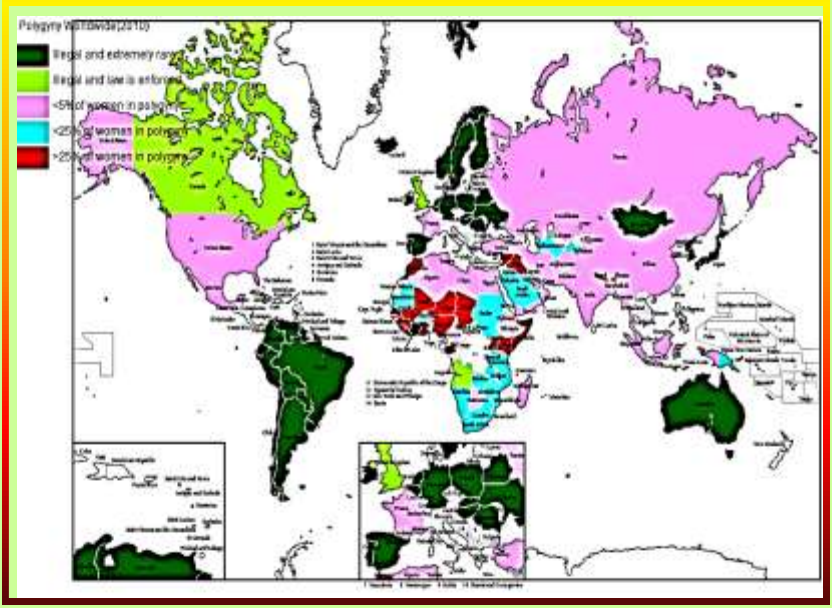


Fig. 2.22 Prevalence and legal status of polygyny (2010)

2.11 POLYGAMY AMONG INDIAN MUSLIMS

It is usually considered that polygamy is more among Indian Muslims. Anti-Islam political parties propagate this fake information to make the majority fearful. But the realities are totally different. Dr. Shaista Perveen has done Ph.D. research on “Polygamy in the Indian society”, [36]. She has collected various survey reports on this issue. These reports focus on the polygamy in different societies spread all over India (Table 2.1 to 2.4 and corresponding figures from Fig. 2.23 to Fig. 2.27).

Table 2.1 Survey Report-1

S.No	Society	1931-40	1941-50	1951-60
1.	Tribes	9.35%	17.53%	17.98%
2.	Hindu	6.79%	7.15%	5.06%
3.	Muslim	7.29%	7.06%	4.31%

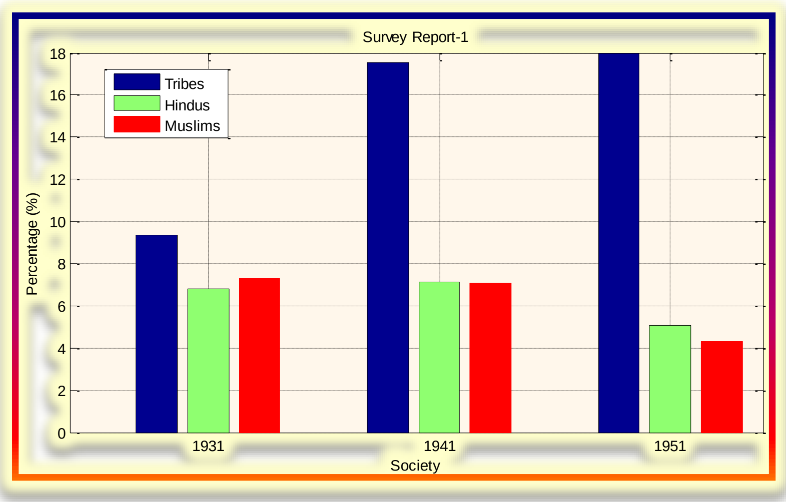


Fig. 2.23 Graph of Table 2.1

Table 2.2 Survey Report-2 (1961)

S.No	Society	1961 (%)
1.	Tribes	15.25
2.	Buddhist	7.97
3.	Jain	6.72
4.	Hindu	5.08
5.	Muslim	5.07

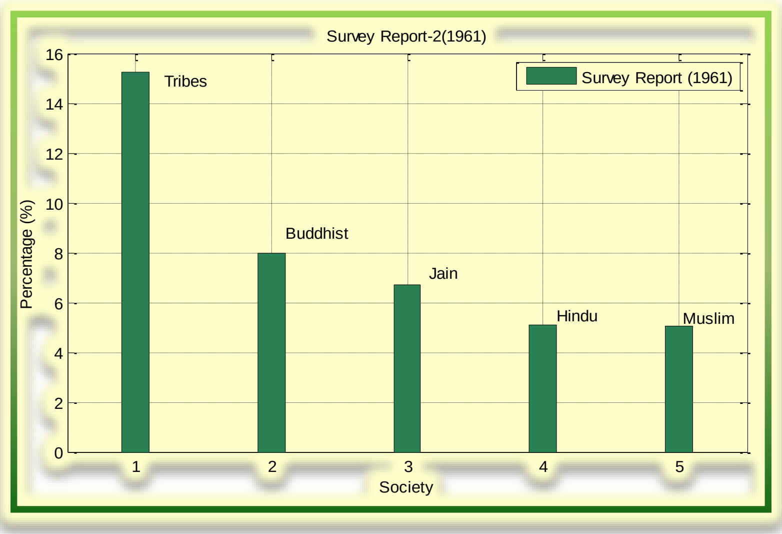


Fig. 2.24 Graph for Table 2.2

Table 2.3 Samta Benergy's Survey Report (1961)

S.No	Society	1961 (%)
1.	Tribes	15.25
2.	Hindu	5.06
3.	Muslim	4.31

Table 2.4 World Development Survey Report (1991)

S.No	Society	1991 (%)
1.	Tribes	15.25
2.	Buddhist	7.97
3.	Hindu	5.80
4.	Muslim	5.73

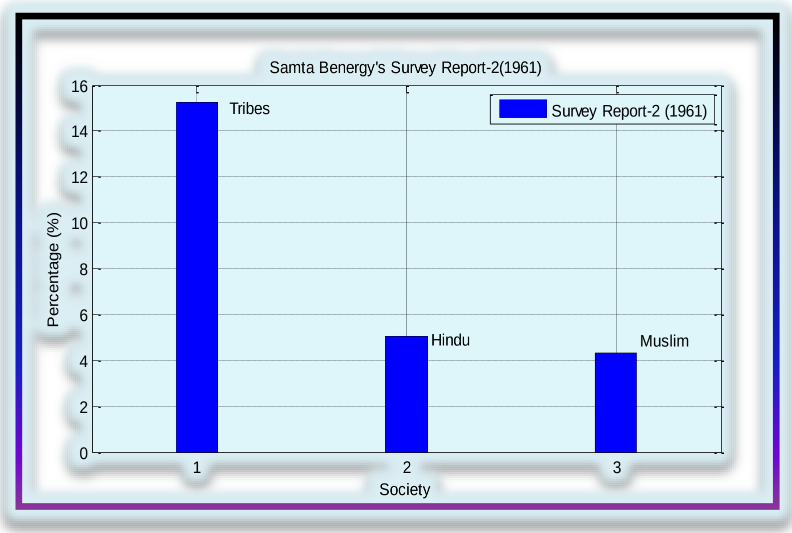


Fig. 2.25 Graph of Table 2.3

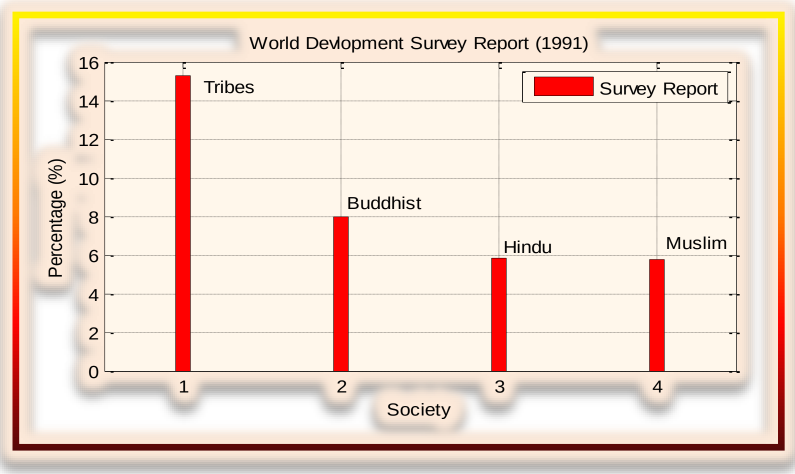


Fig. 2.26 Graph for Table 2.4

Table 2.5 Tamil Naidu's Survey Report (1984)

S.No	Society	1984 (%)
1.	Hindu	5.05
2.	Muslim	4.2

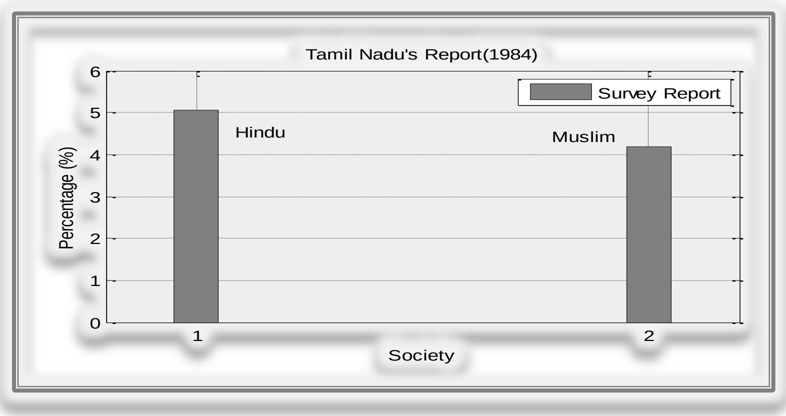


Fig. 2.27 Graph for Table 2.5

Many other survey reports are provided in the above specified thesis. From all these reports it can be concluded that the percentage of polygamy is minimum among Muslims.

One more survey was carried out by the government in 1974. It shows the polygamy rate as:

- 5.6% among Muslims
- 5.8% for upper-caste Hindus

Research by Mallika B Mistry [37], later confirmed by John Dayal that:

"There is no evidence that the percentage of polygamous marriage among Muslims is larger than for Hindus."

According to the 3rd National Family Health Survey (NFHS) carried out in 2006, 2% of women reported that their husbands had more than one wife. More than the religion of the parties involved, the major reasons of polygamy were found as:

- Not having a child
- Not having a male child
- Wife's less education and
- The age of first wife

It was found that:

- Hindu was likely to have 1.77 wives,
- Muslim 2.55
- Christian 2.35
- Buddhist 3.41

The details of the survey (2006) are shown in Fig. 2.28.

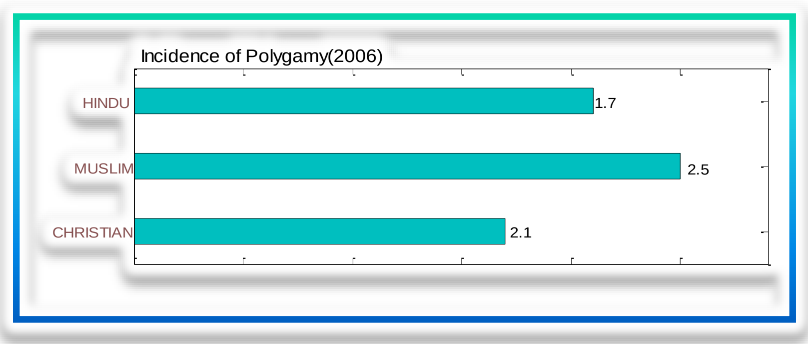


Fig. 2.28 Polygamy in India (2006)
Source: National Family Health Survey, India

Ritu Menon, a feminist publisher and an independent scholar, has worked on polygamy. She wrote a book, as co-author, on

"Unequal Citizens: As study of Muslim Women in India". She writes in her book:

> *"It may be allowed by the Muslim personal law, but the incidence rate is not that high. This is true particularly in relation to Hindus, but across all communities, polygamy is not that common. Bigamy, on the other hand, is fairly common and that's true across religions".*

Subsequent data seems to confirm this detail [38].

2.12 SUMMARY

It is the reality that the permission for polygamy is the requirement of a healthy society. For women it is beneficial and merciful. However, the limits and conditions for polygamy that are formulated by the Islamic law shall be strictly observed. Otherwise it is considered as the exploitation of women but not a clemency.

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CHAPTER 3

DIVORCE FROM THE ISLAMIC POINT OF VIEW

3.1 INTRODUCTION

In view of the Islamic law, marriage is pure, strong and a durable relationship. Islam wants the husband and wife to retain the relation as they have taken an oath to be faithful to each other in the name of 'Nikah'. The Islamic law does not favour breaking of this tie for small and trifle reasons.

The Quran has specified the relation of marriage as the cause for peace and tranquillity for the husband and wife (Room, 31). They are considered as garments for each other. The garment is used to protect the secrets of oneself, a companion during heat and cold, and guard the body from various infections and diseases. Similar is the case of husband for the wife and wife for the husband. They hold secrets and hide weaknesses of each other while supporting each other in ups and downs of the life.

In Islam, marriage has an extremely important role to play, as this leads to the preservation of strong character and piety. Two different families come together with love and affection a new bond will be formed between them. This bond becomes the base for growth of a new generation.

If by chance marriage is broken, then there is equal number of disadvantages on either side. The wife and husband both suffer. Children are left with only one parent. Nourishing children and educating them becomes a serious problem. Two families who had come very close due to marriage depart with hatred when it is

broken. Hence, from the beginning itself, Islam suggest precautionary measures to avoid such bitter situations.

At initial stage, Islam does not force the boy and girl to accept marriage without their will and wish. Even if one of them does not like to get married, the patrons are not supposed to force them for marriage.

An issue had arisen during the period of Prophet Mohammad (PBUH). One girl came to the Prophet (PBUH) whose father had forcibly arranged her marriage with a man whom she did not like. The Prophet (PBUH), then, rejected (dissolved) this marriage [1].

Islam also permits the groom and bride to see each other before tying themselves in the contract of marriage [2].

Islam even permits to see the compatibility among family status of the boy and girl to avoid future complications. Usually it is difficult for a boy or a girl to accept the other party from a family of lower background, leading to separation or Divorce.

3.2 DIVORCE IS A DETESTABLE DEED

The meaning of Talaq (Divorce) is to break the marriage; hence it is extremely disliked in Islam. The Prophet (PBUH) said that among the things that Allah has permitted, divorce is the most detestable. A similar Hadith is narrated by Hazrath Abdullah bin Omer (RAA) [3].

Hazrath Abu Mosa Ashari narrates: The Prophet (PBUH) said, while condemning those who divorce without any logical reason:

> *"Women should be divorced only when their character is doubtful, since Allah does not like those men and women who marry just to taste each other",[4].*

Thus, the divorce is not simply permitted. It is permitted only when required [5]. The same is the view of Allama Ibn-e-Abedeen Shami [6]. Similarly, the trend in women for claiming the divorce is disliked.

Thus, Hazrath Souban (RAA) narrates:

> *"The Prophet (PBUH) said: The woman who demands divorce will not be able to smell the fragrance of paradise"[7].*

It is also true that sometimes divorce becomes the most important. It becomes almost impossible for the wife and husband to stay together. The circumstances will be in such a way that the departure of husband from wife leads to peace and harmony in their lives. In such situations, the Islamic law permits the usage of divorce.

3.3 REASONS FOR THE LEGALITY OF DIVORCE

It is a fact that few things are necessary in the life though they are not liked. For example, a residence without a washroom is incomplete, however furnished it is.

It is the responsibility of a doctor to treat a patient. If the doctor avoids surgery when it is necessary just because it is painful or difficult, then he is no more a complete doctor.

Similarly, if there is marriage but there is no separation at any cost, then it may lead to hell in one's life. Thus the family law is incomplete if it does not have any option to break the tie of marriage.

When divorce is made invalid, it means, however bitter and disharmonious the relation between the wife and husband has become, neither for the husband nor for the wife separation is possible. Every day and every moment, they burn in fire of hatred

and disharmony. By nature, human beings demand peace and in this case, the peace is guaranteed only when they get separated.

Muslim population worldwide is approximately 21.01% i.e., around 1/5 of world population (Fig. 3.1). But it is only Islam which has kept the door open for the separation between the husband and wife either through divorce or 'Khula'. Other religions have closed this door. Practically, the life does not go smoothly without the option of divorce. Slowly, people from different religions have opened the door of divorce for themselves, revolting the teachings of their own religions.

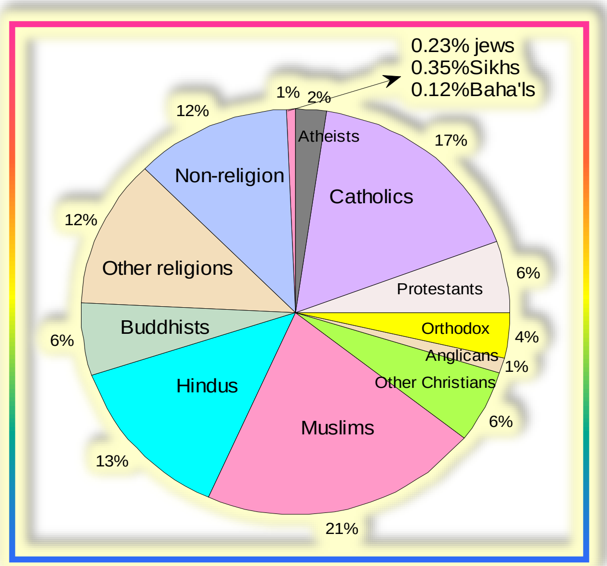


Fig. 3.1 Percentage of population by religion (2007)

For instance, to satisfy the requirements of peace and harmony, people from two great religions (Hinduism and Christianity) have introduced the concept of divorce in their societies. The Fig. 3.2 shows percentage of divorce with respect to different religions.

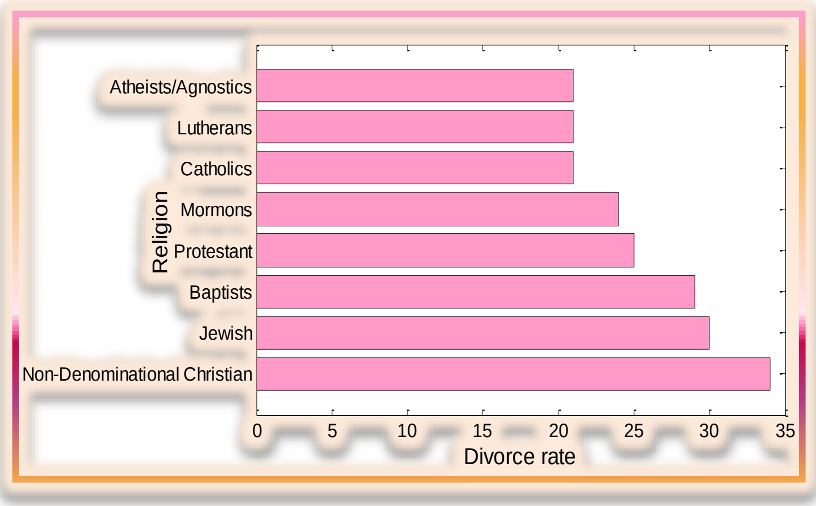


Fig. 3.2 Divorce rate as a function of religious belief
Source: Barna Research Centre, Dec 1999

According to the Hindu Shastra, divorce is invalid and except death no one can break the tie of marriage. Though a big group of people (i.e., 13.26%) believe in this religion, they had to modify its teachings for the daily life. Presently, the percentage of divorce among Hindu brothers is more than that of Muslims.

The other religion which does not validate divorce is Christianity. This invalidity is based on the teaching of Jesus. He said:

> *"The bond that is tied by the god should not be broken by anyone".*

This was taught as a part of morals, but the Christian world has recently taken this statement as the law and completely forbidden the divorce.

Gradually, Christians started creating reasons to validate divorce. Presently, divorce is made easy and simple compared that of the

past, in the Christian world. Hence, the percentage of divorce has gone to the maximum compared to that of other societies.

Hence, it can be concluded that as marriage is a necessity so also the divorce.

3.3.1 Legality of divorce in various countries

Various countries worldwide has legalised divorce recently as the respective religions were in opposition for long. Table 3.1 gives brief description of this scenario [8].

Table 3.1 Legality of divorce in various countries

Argentina	In 1954, President Juan Domingo Perón, had passed the law for the first time in the country. But he was forced out of the presidency one year later by a military revolt, and the government abolished the law. It re-established in 1987.
Brazil	Divorce became legal for the first time in 1977.
Bulgaria	A new Family Code came into effect in 2009 including the divorce law.
Canada	The federal Divorce Act of 1968 standardized the law of divorce.
British Columbia	The Family Law Act is active since 2011 for the divorce.
Chile	Divorce is legalized in 2004.
France	The Civil code, modified on January 1, 2005, permitted divorce.
Greece	Marriage and divorce regulations have undergone important changes in 1982 and 1983.
India	Hindus, Buddhists, Sikhs, and Jains are governed by the Hindu Marriage Act 1955, Christians are governed by The

	Divorce Act 1869, Parsis by the Parsi Marriage and Divorce Act 1936, Muslims by the Dissolution of Muslim Marriages Act 1939 and Inter-religious marriages are governed by The Special Marriage Act 1954.
Ireland	Laws of 1997, made divorce possible for parties who are separated for four out of the preceding five years.
Italy	Divorce was introduced by the law of 1 December 1970.
Malta	Legislation introducing divorce came into effect in October 2011.
Philippine	Divorce is not legal. But Muslims are allowed to divorce in certain circumstances

3.3.2 Difficulties in divorcing in non-Islamic family laws

The laws of inheritance after divorce vary worldwide. It is only Islam which liberates men, after divorce, from giving inheritance to their wives and vice versa. In Islam, children continue to keep relation with both the parents after the divorce.

Except in the Islamic family law, in every other family law, pre and post-divorce difficulties are at extreme. Following are some of the major difficulties:

- In some of the laws, divorce is still not permitted.
- In some laws, the wife and husband should have at least five years of separation before applying for the divorce. Their separation should be for at least four consecutive years.
- In some laws parents with small children cannot apply for the divorce.
- The process for applying and getting the divorce is extremely difficult, time and money consuming.

- In some of the laws the husband or wife seeking the divorce should prove that the other spouse is involved in adultery.
- Property built after marriage either by the husband or wife is considered of both. After divorce the husband can claim property of the wife and the wife can claim from the husband.
- In some countries, after divorce, children shall belong to one of the parents. They can continue to be the children of only one parent but not both. The other parent is not permitted by the law to even visit the children.
- Permanent Alimony, also known as 'maintenance' or 'spousal support' should be granted in many cases, especially in longer term marriages.

Due to such reasons, people fear to enter wedlock. Hence, majority in the western world try to avoid marriage and cohabit with the other partner, leaving illegitimate children and even the spouse alone after a year or two.

3.4 REASONS FOR DIVORCE TO BE THE HUSBAND'S RIGHT

Who is more appropriate to have the right to divorce? Difference scenarios can exist in this regard:

- Only the wife is given the right
- Only the court can declare divorce
- Only the husband is given the right to divorce
- The husband and wife both can be given the right

Neither in the western world nor in the eastern world only the woman is given the right to divorce. By nature, women are more sentimental and emotional compared to men. These qualities are good and required as far as her responsibilities as a wife and a

mother are considered. These qualities make her hasten in her decisions and can harm her, children and the society, when it is the matter of separation or divorce. For these reasons, no nation and civilisation has ever given the right of divorce only to women.

The western world has given the right of divorce to the court. Whether, the husband has complaints against the wife or the wife has complaints against the husband, they need to approach the court. Only the court can take the decision of divorce.

Islam has not prohibited the wife and husband from approaching the court (which implements the Islamic law), but the decision of divorce is not based only on the court. If the husband's attitude is not justified or for any other reason the wife does not want to continue to be in the tie of marriage, then, she can approach the court. If the court finds her reasonable and justified, it can dissolve the marriage.

Islam has permitted the court as well as the husband to divorce. Few important points are to be remembered in this regard:

- Divorcing without any strong or valid reason is strictly prohibited in Islam. Jurists have declared this act to be a severe sin. Those who are serious in religious matters, never misuse this right.
- In Islam, the mother is given more respect and has high dignity compared to that of the father. Hence, when children are grown up, they stop the father from divorcing their mother.
- Islam has kept the financial responsibilities only on the man. Maintenance of the wife and children is on the man only. He has to move around in search of livelihood. It is

his necessity to depend on his wife for the proper nourishment and education of his children. These aspects shall certainly stop him from divorcing his wife.

- As a consequence of divorce, financial responsibilities are also on the husband. He has to pay the dower to his wife and maintenance during probation. If children are very young, the wife has the right to take care of them. In this situation, the man has to provide maintenance of the children and their mother. Hence, the husband shall be very careful while using the right to divorce.

- Usually, the husband and wife start quarrelling due to some small incidents. Gradually, hatred develops and finally it ends at divorce. Hence, in the Quran precautionary measures are taught to the husband and wife to avoid divorce (Quran (4:34-35)):
    - Initially, verbal explanations and warnings should be given to the wife.
    - If this does not work, he can separate her resting place.
    - If this does not work, he can strike her mildly (but not on face).
    - If a woman is stubborn to continue her mischief, then,
    - The dispute should be dissolved by inviting a person (arbiter) from the woman’s side and a person from the husband’s side

These are the reasons and impediments kept for the husband, so that he does not utilise the right to divorce unjustly. Moreover, a man is given more decision power and is less emotional compared

to a woman, hence the right to divorce is given to the husband but not to the wife.

Frequently, it is questioned why the court is not given the right, since the man can misuse it. But through observations, it can be proved logically wrong. If the court is given the sole right to divorce, then the following problems may arise.

- Sometimes the husband and wife both show interest in departing from each other and settling themselves in a new life. In this case, if the court takes long time to separate them, then the husband (Muslim) has chance to marry to another woman but the wife has to wait for the decision of court.
- To get divorce through the court, the husband and wife both have to expose weaknesses of each other publicly. Usually, a society accepts a man with some weakness for his second marriage, but accepting a woman with similar weakness is not practical. Especially, when piety of a woman is doubted to divorce her, it becomes almost impossible to settle herself second time.
- If a husband and wife are forced by the court for its lengthy processing, to stay together, then there is a possibility that the husband adopts cruel methods to get rid of her. Either he may try to kill her or burn her, as it usually happens in the Indian society where divorce is a tough task. Since, the divorce is made much easy in Islam compared to that of Hindu law; the death rate of brides is less in Muslims compared to that of Hindus. Thus, the divorce is like a fuse which burns itself and protects the house from burning.

- It is the reality that even in the western world the wife is not given the right to divorce. In the name of maintaining equality, men and women both are given the right to approach the court for separation. Consequently, the rate of divorce is at maximum in western countries.

3.5 DIVORCE STATUS WORLDWIDE

Fig. 3.3 shows the crude rate of divorce worldwide [9]. The American and European countries show the maximum divorce rate. In Arab countries divorce is much less comparatively. To understand the divorce rate in Muslim countries Fig. 3.4 can be correlated with Fig. 3.3.

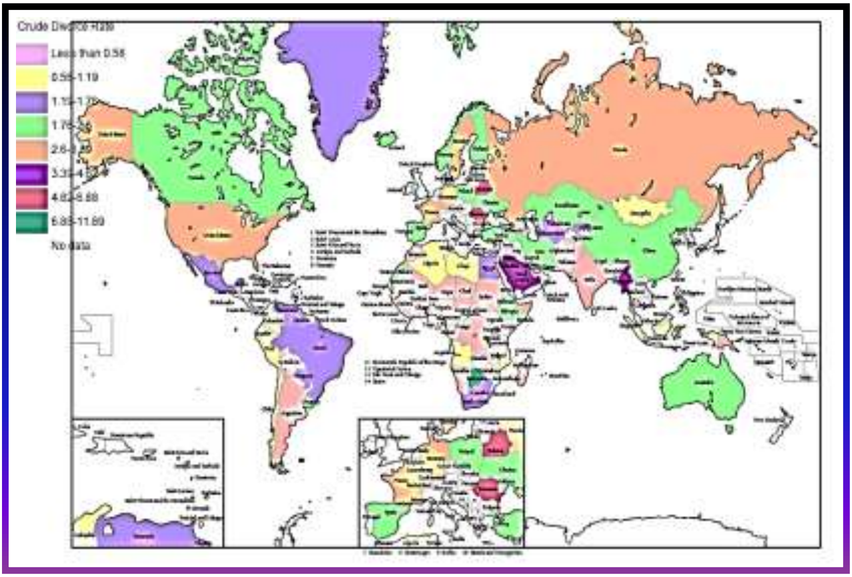


Fig. 3.3 Crude divorce rate worldwide

For some of the countries, the data is not available as the issue of divorce is not significant there. Hence no surveys are usually performed in such countries to collect the data. However, the

divorce rate in such countries is found to be gradually increasing. Hence, a survey was made in 2011 for the countries with least divorce rate [10] (Fig. 3.5).



Fig. 3.4 Muslim population worldwide



Fig.3.5 10 countries by lowest divorce rate (2011)

3.5.1 The divorce rate in America

In the US, the divorce rate was 40% in 2009 and when compared to that of Asian countries it was double (Fig. 3.6). According to Jennifer Baker (2011) of the Forest Institute of Professional Psychology in Springfield, Missouri, in US the following percentage of marriage end in divorce:

- 50% of first marriages
- 67% of second and
- 74% of third marriages

The lure for men is a new childhood of pleasures and self-interests with new women almost every day. Hence, the divorce figure for first marriage rose to 55% in 2013.

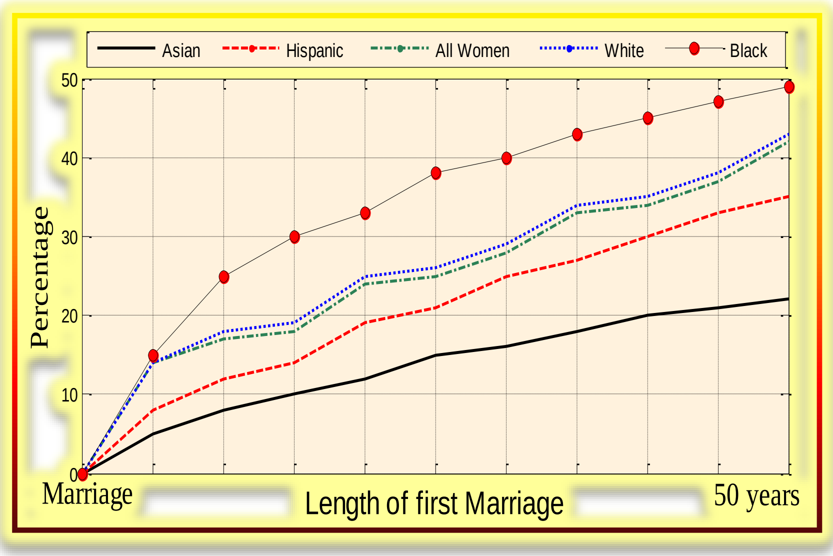


Fig. 3.6 Increasing divorce rates in Asia and US (2009)
Source: US Census Bureau

In Fig. 3.7 difference in the percentages of separation in American families is shown [11]. Comparing the statistics of 1950 with that of 2012, it can be observed that the huge growth in separation rate is found among single parents and the working wives.

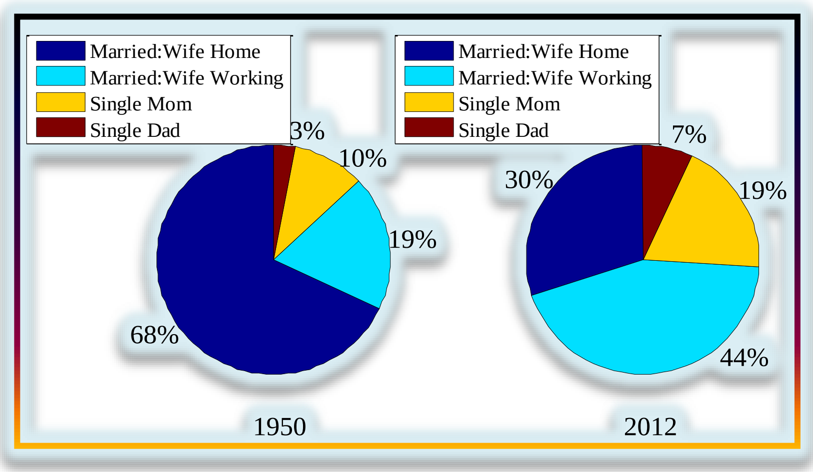


Fig. 3.7 Separation in American families

3.5.2 Women's right to divorce (through a court) in America

A religious website of Christians gives the clear picture of present American society which is totally broken due to the huge number of divorces [12]. According to the website:

- Execution of the "family law act of 1970" caused the divorce rate to rise by 40% in just one year.
- Conceding women, legal rights, invoke a fifty fold increase in the US divorce rate.
- 21 million Americans died as a direct result of this increased divorce rate, including 1,000,000 divorces related suicides and 1,000,000 divorce related murders in the 20th Century alone.

- 8 million of these deaths were due to the 44% rise in the mortality rate of the children of divorcees.
- Altogether, feminists cost 55 million American lives in the twentieth century.

American society has no respect for the sacredness of marriage. The website continues to state:

- Feminism is the other name for the "right to commit adultery".
- Feminism teaches women to discard husbands, as old rubbish, a pair of torn shoes or garbage.

When women enforce their authority through the courts over men, all modes of wickedness flourishes, such as:

- Abortion
- Nudity
- Fornication
- Homosexuality
- Despising motherhood
- Pornography
- Divorce

K.D. Sharma has written in his article [13]:

"In the United States of America divorce and separation has totally spoiled the concept of marriage and the consequences are extremely horrible. No such example could be found in the history of any civilization. Every fourth marriage (now, every second marriage) ends with a divorce, though the total population is only 6% of the world population" .

3.5.3 The divorce rate in UK

Divorce rate in UK has increased and recently became 42% (2011). Fig. 3.8 shows the divorce rates in England and Wales for 2011.

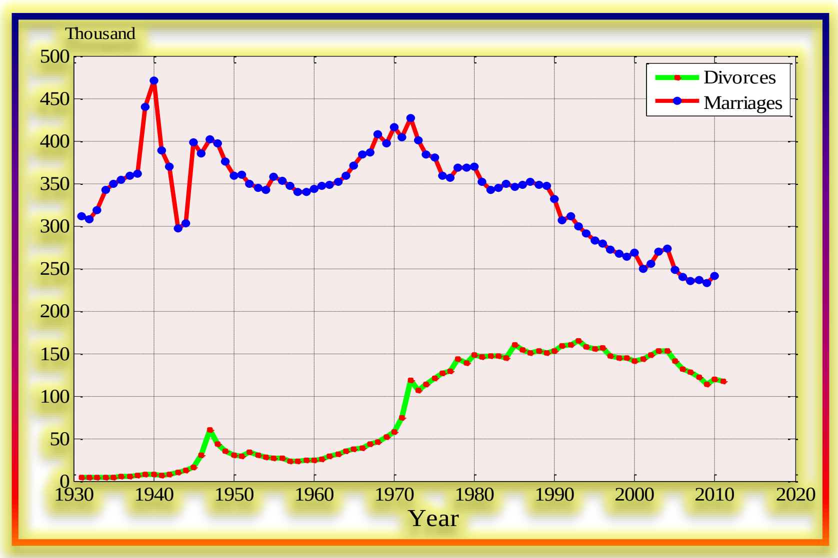


Fig. 3.8 Divorce rate in England and Wales
Source: Office for National Statistics (UK-2011)

As per the new statistics from the Office for National Statistics:

- 2009: divorces were 113,949 in England and Wales
- 2010: This number increased by 4.9% to 119,589
- 2009: 10.5 (people get divorced per 1000 married couples)
- 2010: It rose to 11.1.
- 2010: there was a rise in the number of divorces for men and women aged between 40- 44.
- 2011: There were 117,558 divorces in England and Wales, down by 1.7% since 2010 due to cohabitation.

- Statistics suggest forty-two percent of marriages end in divorce (Fig. 3.9).

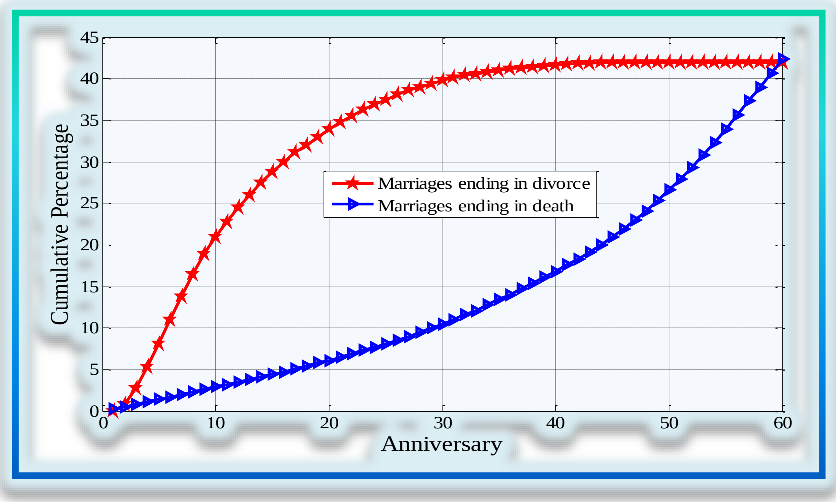


Fig. 3.9 Marriages ending in divorce and death are equal
Source: Office for National Statistics (UK-2011)

3.5.4 The divorce rate in Japan

Data on divorce collected from the Statistics and Information Department, Minister's Secretariat, Japan is shown in Fig. 3.10.

- In 2002, divorce rate was 10%.
- In 2004 it increased to 20%.
- In 2006 it was 30%.
- In 2008 it was 40%.
- In 2010 it was 50%.
- In 2012 it increased to 60%.

Presently (Feb, 2015) it looks as if every married couple is taking divorce, that is the divorce rate is expected to be 100%.

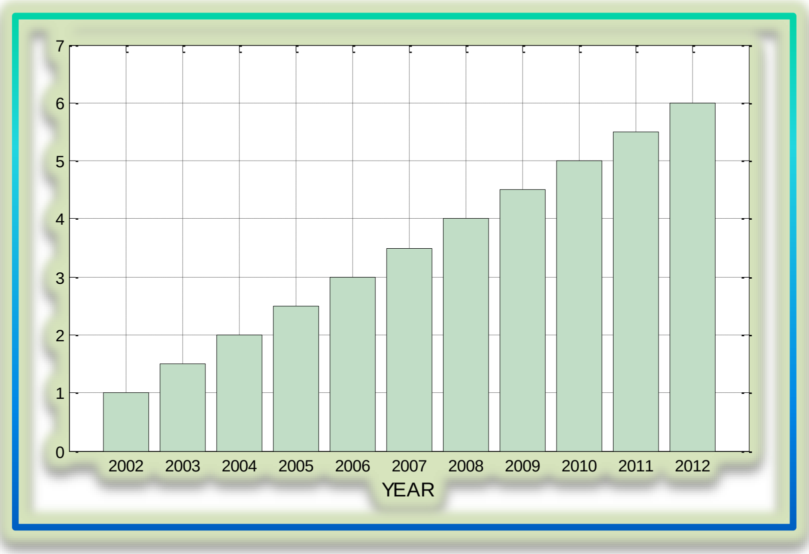


Fig. 3.10 Divorce rate in Japan
Source: Statistics and Information Department, Minister's Secretariat, Japan

3.5.5 The divorce rate in Islamic countries

The crude divorce rate in Islamic countries (Divorces per 1000 population) is shown in Fig. 3.11. As per UN marriage-Divorce data of 2013, 23% divorce exists in Kazakhstan (2008), 22% in Kuwait (2010) and so on. The least divorce rate (6.3%) is found in Uzbekistan.

Though the process of divorce in the Islamic law is easy, even then the divorce rates are found lesser than that of the western society. In Islam, the second marriage of the divorcee is also a simple task. Moreover the post-divorce laws won't continue to

trouble the husband and wife as they do in non-Islamic laws.

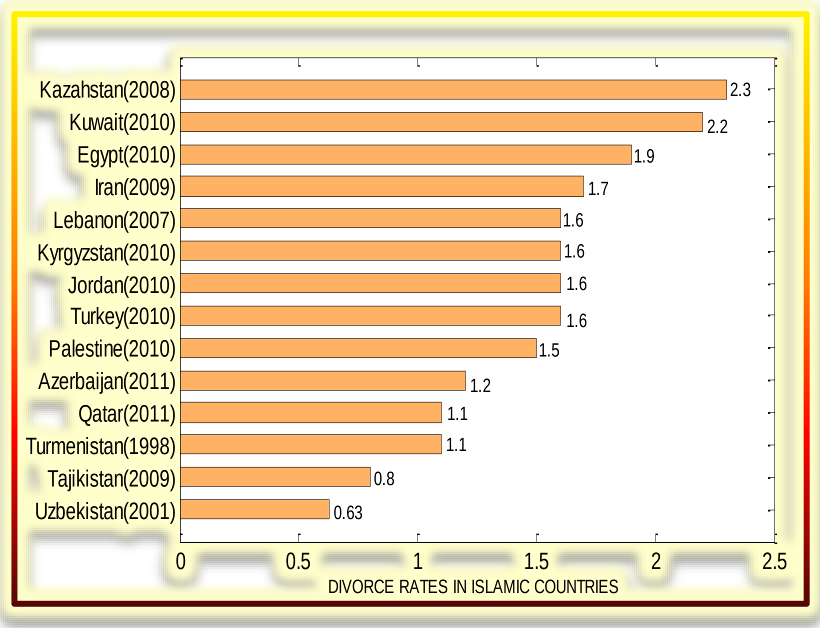


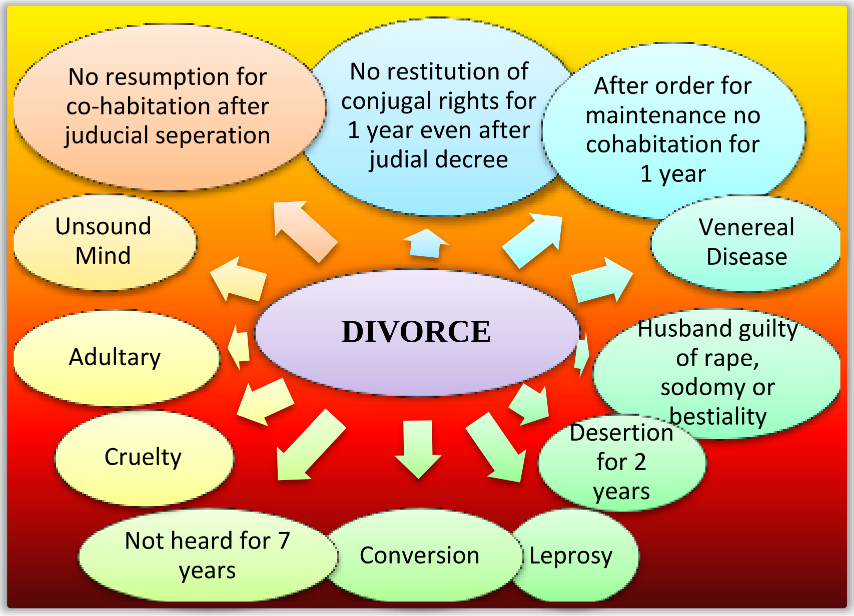
Fig. 3.11 Divorce rates in Islamic countries
Source: UN marriage divorce data (2013)

3.6 DIVORCES IN INDIA

For non-Muslims, legal grounds of divorce in India are very tough to satisfy. As divorcing is not easy, domestic violence has increased in the Indian society.

3.6.1 Legal grounds for divorce in India for non-Muslims

Grounds for divorce in India for non-Muslims are different from those of Muslims. The possible reasons for applying for divorce are shown [14] in Fig. 3.12.



3.12 Legal grounds for divorce in India for non-Muslims

For non-Muslims to take divorce legally, the reason or reasons should be proved in the court. It is not an easy task. It consumes lot of money and time. Moreover, the post-divorce laws are also extremely difficult to follow. For instance, if the ex-husband is earning and the ex-wife is not earning, the ex-husband should provide alimony to the ex-wife after divorce for the remaining life or till she remarries. Similarly, if the ex-wife is earning but the ex-husband is not working, the ex-wife should provide alimony to the ex-husband after divorce.

3.6.2 Domestic violence in India due to difficulties in divorcing

In India the cases of domestic violence are increasing day by day. Dowry deaths are also increasing as the time is advancing. Table

3.2 reflects the existing facts. There are various reasons for domestic violence, but difficulty in divorce is the main cause.

Table 3.2 Deaths due to domestic violence in India

S.No	Year	Deaths
1.	2005	6787
2.	2006	7618
3.	2007	8093
4.	2008	8172
5.	2009	8383
Total in 5 years		39053

3.7 THE DIVORCE STATUS AMONG INDIANS

In India, divorce rates had always been less. Till recently, the divorce percentage was only 1.1. This figure is very low compared to that of western and European countries. The rate of divorce in India was even low in the previous decade, where only 0.74% marriages were used to get annulled. The divorce rate in Indian villages is even lower in comparison to urban India. But now the trend for divorcing has increased. The education among women and their empowerment together are increasing the rate of divorce. The more the women are becoming bread earners, the more are the cases of divorce.

3.7.1 Alarming trends of divorce in India

The recently introduced concept of gender equality is increasing clashes among husbands and wives, leading to their separation. A survey states that over the past four years, in well-known cities of India, the divorce rate has enhanced [15]:

- **Delhi:** Divorce rate is almost doubled and is projected to be 12,000 by the year 2008.
- **Bangalore:** 1,246 cases of divorce were filed in the court (2006) that pertains to the IT sector exclusively.
- **Mumbai:** The number of divorces has shot up to 4,138 in 2007.
- **Kolkata** and **Chennai**: Same trend as that of Mumbai.
- **Punjab** and **Haryana:** Seeing an increase of 150% of divorce rate since the last decade.
- **Kerala:** Has experienced an increase of divorce rate by 350% in last 10 years.

Data shown in Table 3.3 on divorce trend in Madurai is collected from a well-known national newspaper of India that is The Hindu, 19 November, 2013. The newspaper has in turn collected the data from the family court of Madurai.

It can be observed from the table that in 2010 divorce cases were only 635but they increased to 717 by 2012.

Table 3.3 Trend of divorce in Madurai

Year	No of divorce cases filed in the family court, Madurai	No of divorce cases filed by mutual consent
2010	635	Not available
2011	657	149
2012	717	136
2013	692 (as on Sept, 2014)	143 (as on Sept, 2014)

3.7.2 Reasons for rising divorce rates in India

In India divorce rates are increasing day by day. Some of the reasons for rising divorce rates in India are listed below:

- The advancement of technology, increase of the education level and the financial status of families in urban areas.
- Earning of bread by both the wife and husband.
- Acceptance of divorce as a law, as it was not there before in non-Muslims.
- Learned and educated wives and husbands directly approach the court instead of involving family elders for arbitration.
- Lack of tolerance towards each other as a consequence of more money and technical education without moral education.
- Sometimes, when the wife goes for the job there are disputes for other family responsibilities which lead to separation.
- Sometimes, when women become job oriented men are oriented for household work. Hence feel that they can manage life independent of each other.

3.7.3 The divorce status among Indian Muslims

Mostly it is believed that the rate of divorce is at maximum among Indian Muslims. This is fake propagation and a misunderstanding. According to the surveys done throughout India after India's Independence, divorce rate is a minimum in the Muslim society compared to that of other societies. The major reason could be the concept of polygamy in Islam. Since in other religions polygamy is not permitted, it is a must to take divorce from the first wife, to marry another woman. Hence, if a man is willing to marry another

woman for reasons such as: Disobedience of the wife, self-satisfaction, wants of children etc., it is a must for him to depart from the first wife. Since Islam permits a man to marry more than one woman at a time, there is no necessity of divorcing the first wife.

Zoya Hassan (a subject expert in linguistics) and Ritu Menon (a publisher and writer) have conducted a national survey recently. In this survey Muslim women are focussed in various aspects of their life, such as, personal, social and financial.

This survey has exposed that Muslim women are not the sufferers due to polygamy, 'Purdah' system, or divorce. The survey has covered 40 districts of 12 states. 9541 women are interacted. Among them 80% were Muslim and 20% were Hindu. 40% were urban and 60% were rural. The data collected is summarised in Table 3.4.

Table 3.4 Survey details

S.No	Society	Divorce (%)
1.	Muslim	0.41
2.	Hindu	0.47
		Polygamy (%)
1.	Muslim	2.9
2.	Hindu	4.05

3.8 ALTERNATE OF DIVORCE FOR WOMEN

Islam gives option of separation to a woman but in a different style. There are three alternates for a woman to get separated from her husband.

- Tafweez-e-Talaq (تفويض طلاق)
- Khula (خلع)
- Dissolution of marriage (فسخ نكاح)

3.8.1 Tafweez-e-Talaq

A wife can take the authority of divorce from her husband either before marriage or after marriage. This is termed as Tafweez-e-Talaq. In this case, the wife can declare Talaq on herself at any time as per her convenience. Especially, if there was injustice from the husband once, and if she gets opportunity to resettle with him, then before resettling, the wife can take the right of divorce from him to protect her future.

3.8.2 Khula

Khula is to convince a husband to divorce his wife, either through forgiving dower or by giving off some assets. Normally, the husband should get convinced for khula. However, if relations have become bitter, the Qazi can dissolve marriage, without caring for the husband's wish (as per Imam Malik). In India, all Dar-u-Qaza (Office of Qaza) are following Imam Malik in this regard.

3.8.3 Dissolution of marriage

If a husband is cruel towards his wife, tortures her physically and mentally and does not fulfil her financial, connubial and moral rights, then the wife can get the marriage dissolved through the court. Details of marriage dissolution can be found in the books on 'Fiqh'.

It should be made clear that the Islam keeps a column open even to women for separation.

Based on the Dissolution of Muslim Marriage Act, 1939, a Muslim woman can seek dissolution of marriage on the following grounds in India [15].

- The husband's whereabouts are unknown for a period of four years.
- The husband has failed to provide maintenance to the wife for at least two years.
- The husband has been under imprisonment for seven years or more.
- The husband is unable to meet the marital obligations.
- If the girl is married before fifteen and decides to end the relationship before she turns eighteen.
- The husband indulges in acts of cruelty.

3.9 SUMMARY

In view of Islam, divorce is the most disliked deed. However, it is permitted in critical situations of the life. A man is given the right to divorce, so that he does not harm his wife in case if hatred is developed between them. For a woman three alternate methods of separation are permitted by Islam. A court is not given the sole right of divorce as weaknesses of both the parties are to be exposed publicly. This may harm women more than men.

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CHAPTER 4

THE CONCEPT OF ARBITRATION BEFORE DIVORCE

4.1 INTRODUCTION

A former judge of Assam high court, Justice Bahr-ul-Islam, in one of his decisions, gave improper interpretation of ‘Tehkeem’ (Arbitration) before divorce. According to his decision, arbitration is a must through a third person (arbiter) between the husband and wife to dissolve their dispute; otherwise, divorce is not valid.

This decision is followed by the courts throughout India. Most of the people believe that there should be at least an attempt to dissolve the dispute between the husband and wife before going for divorce.

There are three aspects to be considered here:

- How far this is logical?
- Does the Islamic law insist on arbitration before divorce?
- Which verse of the Quran is referred by the court in this regard?

4.2 LOGICAL REASONING

As far as the logical reasoning is concerned, it looks more appropriate to use divorce as the final decision. Before divorce, it is suggested to resolve conflicts between the wife and husband through various ways. If a couple is not able to resolve the matter, then elders of the family should interfere. The Quran does not link intervention of an arbiter with divorce, but it suggested many solutions to avoid divorce. One of the methods is specified in

Quran [1]. But this method is neither made obligatory, nor is treated as a condition to validate divorce.

With this fact women are at advantage, since divorce is not the end of the life. It closes one door (of previous life) and opens another door for a new life.

If the husband is forced to expose reasons due to which he is divorcing his wife, then consequences may not be in favour of the wife. At this point of time it is better if the sincere husband and wife depart without blaming each other publicly.

If there is no weakness of the wife due to which a cruel husband is using divorce, then it is possible that he blames her unjustly to prove himself just. If fake blames are made public, then no one would like to marry that woman, especially when her piety and character are made doubtful. Hence, compulsion of arbitration before divorce may harm the woman more than it can benefit her.

4.3 ARBITRATION IN THE ISLAMIC LAW

We shall find out whether the Islam has made arbitration a must before divorce. We shall focus on the Quran, Hadith, reflections of companions, consensus of Ummah, and Qiyas to get the answer.

4.3.1 The Quran on arbitration

The Quran has nowhere kept any condition to validate divorce. It has not mentioned that the arbiter should be arranged to dissolve the dispute before pronouncing divorce. In the Quran, 14 times, the issue of divorce is discussed. Nowhere, it is mentioned that the arbitration is a must before divorce. Some of the verses give instructions about probation period after divorce. Some of the verses deal with the kind of divorce and separation issues and

some speak about the maintenance after divorce. None of the verses state that arbitration is a must before declaring divorce.

Details of divorcing a woman are provided in the Quran [2]:

> *"A divorce is only permissible twice: after that, the parties should either hold together on equitable terms or separate with kindness. It is not lawful for you (men) to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If you (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by Allah; so do not transgress them. If any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others)".*

Primarily, if the husband has given one or two divorces, then he can re-join with his wife. Through the verses of Quran and Ahadith this is made clear that re-joining is possible during probation period.

Secondarily, if the husband has already paid dower or has given much more, then it is not appropriate to take it back. If the wife is interested in taking divorce, then she may return Mahr (Dower) received by her.

Finally, if the husband has divorced his wife third time, then he can neither re-join nor marry with the same woman. Marital life between them is possible only when she marries another man and if incidentally the second husband divorces her and then the former husband marries her again.

Details about divorce are specified in the above verse as well as in one more verse of the Quran [3]. In the later verse it is instructed to declare divorce in the status of purity to avoid elongation of probation. In these verses it is nowhere said that there should be arbitration before divorce.

4.3.2 Hadith on arbitration

After the Quran, Hadith is given the next priority to formulate the Islamic law. In Sunnah (collection of hadith) there is no evidence that the Prophet (PBUH) had ever made the arbitration a must. There is no Hadith related to divorce where He (PBUH) has enquired whether there was arbitration before divorce.

> *The Prophet (PBUH) had divorced Hazrath Hafsa (RAA) but soon re-joined with her [4].*

> *Hazrath Uqba narrated: Hazrath Jibrail (PBUH) came to the Prophet (PBUH) and said "Allah has instructed you to re-join with Hafsa (RAA)", hence, the Prophet (PBUH) re-joined 5].*

In this Hadith the arbitration is nowhere mentioned. Further, how anyone else can be the arbiter when the Prophet himself (PBUH) was present. He (PBUH) was the arbiter for the whole Ummah [6].

> *Hazrath Abdullah bin Omer (RAA) had divorced his wife during her menstruation. Hazrath Omer conveyed this information to the Prophet (PBUH). He (PBUH) got extremely angry and said: "Tell him to re-join with his wife. If his intention is to really divorce her, then he can, but during her state of purity"[6].*

> *Abdullah bin Omer had divorced her only once hence; there was a possibility of re-joining. Further, the Prophet (PBUH)*

had not enquired whether he had called someone for arbitration before divorcing.

Hazrath Ubadah bin Samit (RAA) said: "My grandfather has divorced his wife 1000 times". He enquired about the law in this regard from the Prophet (PBUH). He (PBUH) said "does not your grandfather fear Allah? Three are valid and remaining 97 are transgression and cruelty. It is on Allah either to forgive him or to punish him",[7].

4.3.3 Practice of the Companions

The life style of companions of Prophet (PBUH) used to be in accordance with the teachings of Quran and Sunnah. Hence, the statements of companions are treated as almost equal to that of Sunnah by Muslim jurists. From the statements of companions also, it is obvious that the arbiter is not necessary before divorce.

One person approached Hazrath Abdullah bin Masood (RAA) and said "I have divorced my wife 99 times. What is the instruction for me? He said "Three divorces are valid, remaining are transgression and cruelty"[7].

4.3.4 Consensus of the Ummah

After the Quran and Sunnah, consensus of the Ummah (followers of the Prophet (PBUH)) is the source of the Islamic law. It means when all Muslim jurists unite on some issue, it becomes law. Presently, there are five schools of law based on "Ehle-Sunnat-ul-Jamat". These are Hanafi, Shafai, Maliki, Hambali and Salafi. Ehle Tashi follows "Fiqh-e-Jaffari". Other than these, there are two more. One is Fiqh-e-Zaidi spread in Yemen, and the other one is Fiqh-e-Abazi, spread in Saltanat-e-Masqat. Books of these schools of law are available in open literature. Among these

schools none speaks of arbitration before Divorce. Literature of Muslim jurists of later ages is also available but no one has specified any significance of the arbitration before Talaq. Among these are Sufyan Suri, Awzai, Hasan Basari, Lays bin Saad, Ibn-e-Jarir Tabri and Dawood Zaheri.

Hence, it can be stated with certainty that the Ummah is united on this issue.

4.3.5 Qiyas

Fourth source for Islamic law is the Qiyas (Guess). If any issue is not discussed in the Quran and Hadith, but if its similitude is found in them then the instruction relevant to that similitude shall be followed.

Similar to divorce (Talaq), there are four situations: Khula, Ela, Lian and Fasq. Former three are specified in the Quran and the latter is explained in Ahadith.

- **Khula:** In Khula Talaq is declared on the request of wife.
- **Ela:** In Ela, if the husband takes an oath that he will not have any connubial relation with his wife, then after four months, automatically Talaq will get implemented.
- **Lian:** If the husband blames wife for immorality and wife refuses to accept the blame, then if a court separates them it is considered as Lian.
- **Fasq:** Through a Qazi, marriage can be dissolved. This is specified in Ahadith.

However, in no situation arbitration is made a must before separation. Based on the Qiyas it can be stated that the arbitration is not necessary for divorce.

4.4 THE DIFFERENCE BETWEEN MORAL INSTRUCTIONS AND THE LAW

In every law, few instructions will be related to morals and few will be about the rules. Especially, in religions, large part will be about morals. For instance, respecting elders, caring for children, helping others in lifting their luggage, being good with neighbours are morals but not the law.

Similarly for divorce, many instructions are related to morals. For instance, divorce should not be declared when the husband had intercourse with his wife during the status of her purity (days when she is not menstruating). That is the husband should divorce her without any intercourse. By chance if divorce is declared under this condition, then it is valid but this act is considered a sin. In the incident of Abdullah bin Omer (RAA), he had divorced his wife during menstruation. The divorce is considered valid. A Hadith clearly specifies this validity [8].

Hence, whatever steps are suggested to be taken by the Quran to resolve the dispute between the wife and husband there is nothing to do with divorce. These suggestions are related to morals but not to the law. These are not the conditions to be fulfilled for the divorce to take place.

4.5 A DECISION OF THE COURT

Indian courts refer to the verse of Quran [1]:

> *"Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to*

those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their, beds (and last) beat them (mildly); but if they return to obedience, seek not against them means (of annoyance): for Allah is the Most High, Great (above you all). If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation: for Allah hath full knowledge, and is acquainted with all things ".

In these verses the position of men and women is presented. The man is the head of the family. The woman is instructed to obey her husband in rightful matters. Because of the routine interaction between the husband and wife there are possibilities of conflicts between them. In case the wife is not fulfilling her responsibilities, then the husband is suggested to resolve this issue at personal level by:

- Warnings and strict instructions
- Maintain distance temporarily
- Mild beating (but not on face)

If the dispute is not resolved, then the society is suggested to appoint the arbiters, one from the wife's family and one from the husband's family. These are the two verses, for resolving dispute, nowhere divorce is specified. At personal level the husband should strive to resolve the issue then the society should involve handling the matter.

In the back ground of these verses, some of the Muslim scholars have suggested not to hasten the divorce. If relations are spoiled, all possible methods should be applied to rectify them. Divorce should be the final step but not the initial one. But these resolving

methods are not the conditions to be fulfilled for the divorce to take place.

Three steps that are taught to the husband to resolve disputes are related to solitude of the husband and wife. These cannot be proved in courts publicly. The husband cannot prove that the wife was given warnings, she was separated from his resting place, and she was slightly beaten etc., in the court. Hence, when these steps are considered as mandatory for the divorce to be valid, then they can never be proved nor the divorce can be valid.

Courts are the highest organisations in the society for maintaining the law and order. In our view, courts have high respect and regards. The responsibility of courts is to implement the law. But unfortunately courts are formulating laws instead of just implementing the law.

Since the days of British rule, Indian courts had been referring to the religious scholars to understand the law before implementation. Recently, the trend has started by courts to formulate the law and implement. Especially, the Shah Bano case was the beginning in this aspect. A court tried to interpret the verse of Quran in its own way. Because of the lack of understanding of the Arabic language, wrong interpretation of the verse was made. Thereafter the law for 'Tahaffuz Huquq-e-Muslim Khawateen' (Protection of Muslim Women's rights) was made. But the interpretation of the law was done in such a manner that this law could not fulfil the prime aim of its formation. The All India Muslim Personal Law Board has been requesting the court to amend the said law so that the interference into the Islamic Sharia can be stopped.

The responsibility of formulation of the law is of holy books and the scholars who interpret them. In India the law formulation is by the parliament. The court should lay them as the situation arises. The administration should implement them. But courts are formulating laws and also implementing them. It is more appropriate if the courts limit themselves to their responsibility.

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CHAPTER 5

MAINTENANCE OF THE DIVORCEE

5.1 INTRODUCTION

Maintenance of the divorcee has been a top issue for last one decade. The Shah Bano case in the Indian Supreme court had made the maintenance of a divorcee a national issue. In this background, the Sharia Protection Movement (SPM) had created awareness among Indian Muslims. Understanding of Sharia and its significance for the society is explained to public. This movement has become a bright era in the history of Islam in India. In this regard a bill named "Rights of Muslim Women" was passed.

Muslims were expecting that this bill will resolve the confusion and inconvenience aroused. But some of the courts misinterpreted this law and have defeated its basic aim. So called interpretations fall under the category of the 'Law formulation', but not under the 'Law implementation". Such a decision has hurt true Muslims all over India. Innocent Hindu brothers and even some of the Muslims started favouring the inappropriate decisions of courts.

5.2 REASONS FOR PROVIDING MAINTENANCE

As per the Islamic law, there are three reasons for providing the maintenance. They are:

- Blood relation
- Custody
- Ownership

5.2.1 The blood relation

The father, mother, brother, sister, paternal grandfather, paternal grandmother and some more relatives fall under the category of blood relatives (Qurabat). While providing maintenance, two conditions are to be satisfied. Primarily, the subject is not able to maintain himself/herself and the maintainer should have sufficient source of income to provide maintenance.

5.2.2 Ownership

If a person owns slaves, then it is his responsibility to provide maintenance for them. If someone owns animals, then the responsibility of the owner is to provide their maintenance. In case maintenance cannot be provided, then the Halal (permitted) animals should be slaughtered and eaten. In case the animals are Haram (forbidden), then they should be sold. In no case animals can be kept in hunger and disparity due to the lack of maintenance.

5.2.3 Custody

If a person is in the custody of another person, then the former should arrange maintenance for the later. If a government is having prisoners imprisoned, then it is the responsibility of the government to provide their maintenance. Similarly, when an organization has employed workers, it should pay for the time and work of the employees.

Comparatively, a husband, through marriage contract, takes his wife into custody. She takes care of him, his children his home etc., in turn the husband has to maintain his wife. Whether a person in custody is financially sound or weak, it is the responsibility of custodian to provide maintenance.

If by chance the wife is divorced, she gets maintenance during her probation, thereafter she is liberated from the marriage contract totally. She can marry a second person or she can move around to earn. She neither needs permission for second marriage nor for earning outside, from her former husband. Their relation was formed due to marriage and is broken due to divorce. It is not like blood relation, which can never be broken. They are not owners of each other; they are simply partners to live life together, as long as the marriage contract continues.

Thus, as per the Islamic law, after divorce, a woman is not entitled to get maintenance, except when she is taking care of his children.

In Hinduism, the wife is considered as an asset of her husband. There is no concept of divorce. Moreover the custom of 'Sati' (burning along the husband's dead body) has prevailed due to the concept of wife being an asset of the husband. Hence, in Hinduism there are no rules and regulations for the divorcee. It is believed that as the wife was getting maintenance during the marital life, she should continue to get maintenance even if it is broken.

In Islam marriage is a contract between the wife and husband and can be broken by either of them at any time. The wife is in the supervision of husband as long as this contract continues and her rights are almost equal to that of the husband. Once this contract is broken, they become totally independent of each other there is no logic to compel the husband to take care of the former wife or vice versa.

5.3 THE LOGICAL REASONING

Logically and even socially compelling a man to provide maintenance to his former wife is not appropriate. Some of the

severe consequences that can arise in this regard are focused in this section:

- If a man is told that in case of divorce he will have to provide maintenance to his wife throughout the life, then, instead of divorcing her, he will try to kill her. Consequently, we see murder incidents frequently in daily newspapers. By making legal ways of living life more difficult, we open the doors for illegal ways.
- If maintenance is made a must even after divorce, then there is a possibility that the marriage rate itself reduces as it is happening in the western world (Table 5.1).

Table 5.1 Decrease in the percentage of marriage in various cities of the world

S.No	Country	1960	1970	1980	1990	2000	2009	2010
1.	Austria	83	71	62	59	49	42	45
2.	Belgium	71	76	67	65	44	40	39
3.	Denmark	78	75	52	61	72	60	56
4.	France	70	78	62	51	50	39	39
5.	Germany	95	75	63	65	51	46	47
6.	Greece	77	70	65	58	45	52	50
7.	Holland	77	95	64	65	55	44	45
8.	Italy	77	73	57	56	50	38	36
9.	Portugal	78	79	79	76	48	49	47
10.	Spain	78	73	59	57	54	38	36
11	Sweden	67	54	45	47	45	51	53
12.	Britain	75	85	74	66	52	43	49

- Women with criminal mind may try to trouble their husbands so that they divorce them. Thereafter such women may indulge in wrong with other men while getting maintenance from former husbands.
- There should be some logical reason for maintenance after divorce. When an organization is no more employing the workers then for what it shall give the salary to them. When a prisoner is no more in prison how come it is the responsibility of the government to provide him with the livelihood. Similarly, when the wife is totally liberated from the contract of marriage, how come it is the responsibility of her former husband to provide her with the maintenance?
- How it is possible for a pious woman to eat the earnings of a man who has divorced her, removed her from his life, rejected her to be the part of his life.

5.4 A SOLUTION TO THE PROBLEM

- When a woman marries, her blood relatives continue to exist for her. She is entitled to get maintenance from her father, brother or uncles till she marries another man. The rule of getting maintenance is that, her legal heirs (who are going to get her inheritance) are the responsible people for providing her the maintenance. Moreover, she is entitled to get inheritance from her close blood relatives whether she is divorced or not.
- She gets dower (Mahr), in case of divorce, which can be utilized as seed money to earn.

- The woman has right to take care of her children. Sons can be with her for 8 years and daughters can be with her till they reach puberty. During this span the former husband should provide maintenance of children as well as the wife. Here maintenance of the former wife is due to the responsibility of nourishing children. This maintenance is like a salary or wages of a worker. It is not equivalent to maintenance that is given to the wife who is in marriage contract.
- Most important is the arrangement of second marriage of such women. Islam encourages and instructs the marriage of a single man and a woman, Quran (24:32).

  "Marry those among you who are single, or the virtuous ones among your slaves, male or female: if they are in poverty, Allah will give those means out of His grace".

Thus Islam cares for the divorcees. They are not left alone in the society. However, benefits and disadvantages of laws depend on the behaviour of people. It is the responsibility of Muslims to promote the marriage of divorcees and widows. They should not be treated as superstition. In Arab culture divorcees are not considered as superstition. The woman gets many new proposals for her marriage before her probation period ends.

In India, the marriage of a divorcee is made extremely difficult. Further, Muslim men have become narrow minded. They think that only the wife and children are the responsibility. Even the old aged parents are treated as burden.

The Muslim society should awake. Every person of the society should realize the responsibilities not only towards the wife and children but also towards the widows and divorcee sisters.

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If a person owns slaves, then it is his responsibility to provide maintenance for them. If someone owns animals, then the responsibility of the owner is to provide their maintenance. In case maintenance cannot be provided, then the Halal (permitted) animals should be slaughtered and eaten. In case the animals are Haram (forbidden), then they should be sold. In no case animals can be kept in hunger and disparity due to the lack of maintenance.

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Comparatively, a husband, through marriage contract, takes his wife into custody. She takes care of him, his children his home etc., in turn the husband has to maintain his wife. Whether a person in custody is financially sound or weak, it is the responsibility of custodian to provide maintenance.

If by chance the wife is divorced, she gets maintenance during her probation, thereafter she is liberated from the marriage contract totally. She can marry a second person or she can move around to earn. She neither needs permission for second marriage nor for earning outside, from her former husband. Their relation was formed due to marriage and is broken due to divorce. It is not like blood relation, which can never be broken. They are not owners of each other; they are simply partners to live life together, as long as the marriage contract continues.

Thus, as per the Islamic law, after divorce, a woman is not entitled to get maintenance, except when she is taking care of his children.

In Hinduism, the wife is considered as an asset of her husband. There is no concept of divorce. Moreover the custom of ‘Sati’ (burning along the husband’s dead body) has prevailed due to the concept of wife being an asset of the husband. Hence, in Hinduism there are no rules and regulations for the divorcee. It is believed that as the wife was getting maintenance during the marital life, she should continue to get maintenance even if it is broken.

In Islam marriage is a contract between the wife and husband and can be broken by either of them at any time. The wife is in the supervision of husband as long as this contract continues and her rights are almost equal to that of the husband. Once this contract is broken, they become totally independent of each other there is no logic to compel the husband to take care of the former wife or vice versa.

5.3 THE LOGICAL REASONING

Logically and even socially compelling a man to provide maintenance to his former wife is not appropriate. Some of the

severe consequences that can arise in this regard are focused in this section:

- If a man is told that in case of divorce he will have to provide maintenance to his wife throughout the life, then, instead of divorcing her, he will try to kill her. Consequently, we see murder incidents frequently in daily newspapers. By making legal ways of living life more difficult, we open the doors for illegal ways.
- If maintenance is made a must even after divorce, then there is a possibility that the marriage rate itself reduces as it is happening in the western world (Table 5.1).

Table 5.1 Decrease in the percentage of marriage in various cities of the world

S.No	Country	1960	1970	1980	1990	2000	2009	2010
1.	Austria	83	71	62	59	49	42	45
2.	Belgium	71	76	67	65	44	40	39
3.	Denmark	78	75	52	61	72	60	56
4.	France	70	78	62	51	50	39	39
5.	Germany	95	75	63	65	51	46	47
6.	Greece	77	70	65	58	45	52	50
7.	Holland	77	95	64	65	55	44	45
8.	Italy	77	73	57	56	50	38	36
9.	Portugal	78	79	79	76	48	49	47
10.	Spain	78	73	59	57	54	38	36
11	Sweden	67	54	45	47	45	51	53
12.	Britain	75	85	74	66	52	43	49

- Women with criminal mind may try to trouble their husbands so that they divorce them. Thereafter such women may indulge in wrong with other men while getting maintenance from former husbands.
- There should be some logical reason for maintenance after divorce. When an organization is no more employing the workers then for what it shall give the salary to them. When a prisoner is no more in prison how come it is the responsibility of the government to provide him with the livelihood. Similarly, when the wife is totally liberated from the contract of marriage, how come it is the responsibility of her former husband to provide her with the maintenance?
- How it is possible for a pious woman to eat the earnings of a man who has divorced her, removed her from his life, rejected her to be the part of his life.

5.4 A SOLUTION TO THE PROBLEM

- When a woman marries, her blood relatives continue to exist for her. She is entitled to get maintenance from her father, brother or uncles till she marries another man. The rule of getting maintenance is that, her legal heirs (who are going to get her inheritance) are the responsible people for providing her the maintenance. Moreover, she is entitled to get inheritance from her close blood relatives whether she is divorced or not.
- She gets dower (Mahr), in case of divorce, which can be utilized as seed money to earn.

- The woman has right to take care of her children. Sons can be with her for 8 years and daughters can be with her till they reach puberty. During this span the former husband should provide maintenance of children as well as the wife. Here maintenance of the former wife is due to the responsibility of nourishing children. This maintenance is like a salary or wages of a worker. It is not equivalent to maintenance that is given to the wife who is in marriage contract.
- Most important is the arrangement of second marriage of such women. Islam encourages and instructs the marriage of a single man and a woman, Quran (24:32).

  "Marry those among you who are single, or the virtuous ones among your slaves, male or female: if they are in poverty, Allah will give those means out of His grace".

Thus Islam cares for the divorcees. They are not left alone in the society. However, benefits and disadvantages of laws depend on the behaviour of people. It is the responsibility of Muslims to promote the marriage of divorcees and widows. They should not be treated as superstition. In Arab culture divorcees are not considered as superstition. The woman gets many new proposals for her marriage before her probation period ends.

In India, the marriage of a divorcee is made extremely difficult. Further, Muslim men have become narrow minded. They think that only the wife and children are the responsibility. Even the old aged parents are treated as burden.

The Muslim society should awake. Every person of the society should realize the responsibilities not only towards the wife and children but also towards the widows and divorcee sisters.

CHAPTER 6

THE ISSUE OF ADOPTION

6.1 INTRODUCTION

Among the issues raised against the Islamic law, one is that of adoption. In the Arabic language a son is called ‘Ibn’ and the adopted child is termed as ‘Mutabanna’. In various laws throughout the world, adoption is given space. In Greek and Roman civilizations the concept of adoption existed. Among Hindu brothers also this concept prevails. This is because they believe in the salvation of a man from the cycles of life only when the son burns his dead body. Hence, in the absence of real son the adopted son is given this responsibility.

6.2 THE HISTORY OF ADOPTION

Since ancient times and in all human cultures, children have been transferred from adults who could not be parents to adults who wanted them for love, labour and property. Practice of adoption appeared throughout the history. This section briefly describes the history of adoption.

- The Code of Hammurabi (1754BC) provides the rights of adoptive and the responsibilities of adopted children.
- The practice of adoption in ancient Rome is well documented in the “The Code of Justinian" (6^{th} Century AD).
- In the United States, state legislatures began passing adoption laws in the 19^{th} century. The Massachusetts Adoption of Children Act, enacted in 1851, is widely considered the first “modern” adoption law.

- England passed adoption legislation in 1926.
- Since World War II, adoption is globalized. From Germany in the 1940s and Korea in the 1950s to China and Guatemala (It is a country near Mexico) today, countries that export children for adoption have been overwhelmed by poverty, war, and genocide [1].

6.3 ADOPTION IN ARABS BEFORE THE ADVENT OF ISLAM

Prophet Mohammad (PBUH) was born in Hejaz (part of Arab peninsula). He (PBUH) spread the teachings of Islam from there. Before the advent of Islam, even Arabs used to believe in the concept of adoption. Several examples can be found in Arab history about adoption.

Example 1: The well-known incident is of Zaid bin Harissa (RAA). This incident is linked with the Prophet (PBUH) and is mentioned in the Quran. Some of the people of Mecca had kidnapped Zaid and had sold him as slave. After sometime, Hazrath Khadija-tul-Kubra purchased him, before her marriage with the Prophet (PBUH). After marriage, she gifted Zaid to Him (PBUH). Zaid was emotionally attached to the Prophet (PBUH) and He (PBUH) used to care for him to the utmost. Once, the father and uncle of Zaid came to know about him. They went to the Prophet (PBUH) to take Zaid back to their tribe. The Prophet (PBUH) permitted him to go back, but Zaid preferred to be with the Prophet (PBUH) over his father. On this occasion, the Prophet (PBUH) liberated him from slavery and declared:

> *"O! You people you should witness that I have made Zaid my son"* [2].

This incident was before Mohammad (PBUH) was given the Prophet-hood [3].

Even after Mohammad (PBUH) was given the Prophet-hood by the almighty Allah, Zaid was called as Zaid bin Mohammad (i.e., Zaid the son of Mohammad) by the companions of Mohammad (PBUH). Hazratt Omer bin Qhattab (RAA) said:

> *"We used to call Zaid as Zaid bin Mohammad instead of calling him Zaid bin Harissa till the instruction in the Quran was revealed in this regard that men should be called along with the names of their father",[4].*

In this background only, a verse is revealed in the Quran[5]:

ٱدۡعُوهُمۡ لِأٓبَآئِهِمۡ هُوَ أَقۡسَطُ عِندَ ٱللَّهِۚ فَإِن لَّمۡ تَعۡلَمُوٓاْ ءَابَآءَهُمۡ فَإِخۡوَٰنُكُمۡ فِي ٱلدِّينِ وَمَوَٰلِيكُمۡۚ

> *"Proclaim their real parentage. That will be more equitable in the sight of Allah, and if you know not their fathers, then (they are) your brethren in the faith, and your clients".*

Example 2: A second example is of Hazrath Salim Moula Abu Huzaifa. He was an Iranian. 'Astakhar' was his native place. He came to Medina city as a slave of Hazrath Sabeeta Bint Yeear Ansariya. When she released Salim from slavery, Abu Huzaifa adopted him as son [6].

Famous Mohaddith (Expert in Hadith) Hafiz Ibn-e-Hajr writes about him:

> *"Abu Huzaifa had adopted Salim as Prophet (PBUH) had adopted Zaid Bin Harissa. Abu Huzaifa treated Salim equivalent to his son. Hence, he married Salim to his niece, Fatima Bint Waleed Bin Utba. When Allah revealed the verse (Al-Ahzab, 5), then whoever had adopted anyone, had referred*

the adopted child to his father and when the father was not known, he was referred towards his Mawali (Patron).

There are many more examples of adoption that can be found in the history of Arabs.

6.3.1 Rights of an adopted child among Arabs

All the rights that a real son can have were given to the adopted son. All the responsibilities that a real son is supposed to fulfil shall be fulfilled by the adopted son. Generally, Muslim jurists have specified a few aspects about them, such as their right of inheritance, legality in marriage, and the reference of their father.

About the adoption of Salim Abu Huzaifa, Imam Bukhari writes:

"Before the advent of Islam, if anyone adopted a child, the child was referred with the name of the person who adopted and the adopted child used to get inheritance from him"

6.3.2 Historical reasons for adoption among Arabs

Arabs never believed in the salvation of soul through adoption. Neither had they adopted children when their wives were barren. Polygamy was common in their society; hence there was no question of adopting other's child for such reasons. There were two basic reasons for adopting children among Arabs:

- Primarily, they wanted their child to be brave, healthy, handsome and intelligent. If any slave would have carried these qualities, they would liberate the slave and adopt him as son. Sometimes, during wars, if any captive comes with the above features, they would adopt him. Sometimes they request parents of such a child to gift the child so that they can adopt him. The craze of adoption was so severe in Arabs, that sometimes they used to send their wives to

brave men. Till they conceive, husbands used to be away from them.

- Secondary reason was to have a male baby, if they had only daughters [7].

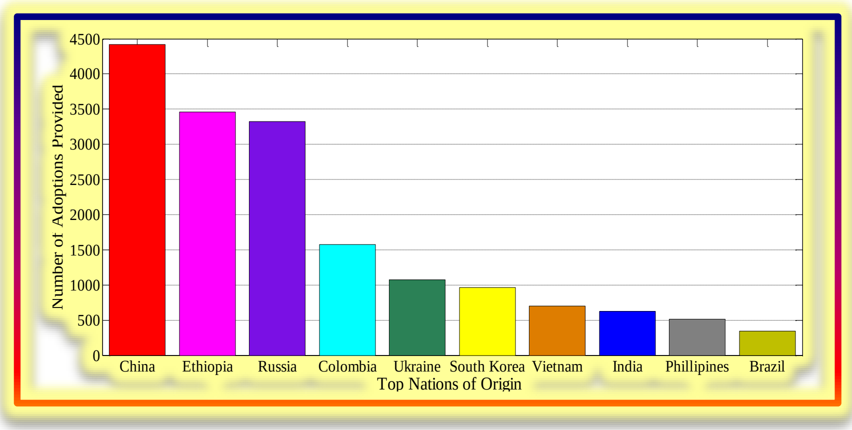
6.4 STATUS OF ADOPTION WORLDWIDE

In 2011, the 12 most common countries of origin for internationally adopted children were, China, Ethiopia, Russia, South Korea, Ukraine, India, Philippines, Colombia, Taiwan, Uganda, Haiti, and Nigeria (Fig. 6.1).

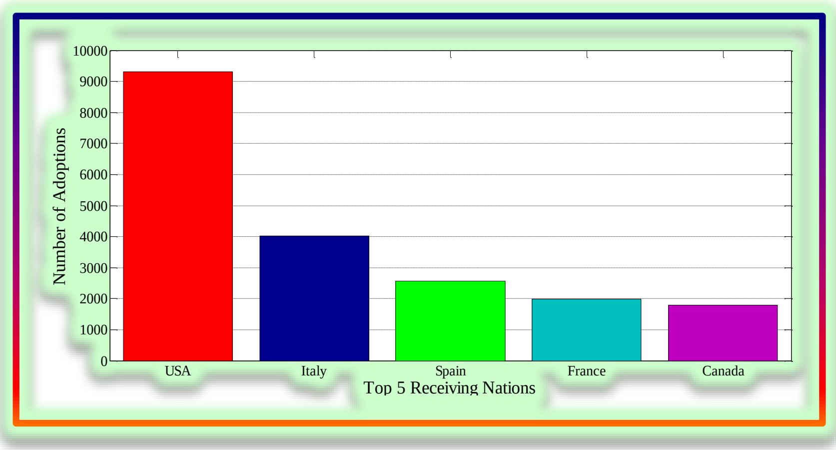


Fig. 6.1 Adoption by country of origin worldwide

Fig. 6.2 shows 9 countries in descending order of the origin of adopted children in 2013. It also shows 5 receiving countries of the world in the same year [8].



(a)



(b)

Fig. 6.2 Adoption status worldwide (2013), (a) Top nations of Origin (b) Top 5 receiving nations

Table 6.1 shows the percentage of adopted children and their age at adoption. Also there were 56% of girls among the adopted child [9].

Table 6.1 Age of adopted children and their percentage (2011)

S.No	Percentage of adoption	Age of adopted child
1.	15%	<1
2.	55%	1-4
3.	30%	>=5

6.4.1 Modern reasons of worldwide adoptions

Ancient adoption practices put emphasis on the political and economic interests of the adopter [10]. To provide a legal tool that strengthens political ties between wealthy families and creates male heirs to manage estates. The use of adoption by the aristocracy is well documented. Many of the Roman emperors were adopted sons [11].

The common reasons of adoption in the latest world are:

- Love for children invokes infertile parent for adopting a child.
- A couple with two or more children of the same gender would like to adopt a child of different sex.
- A couple with only one child usually likes to adopt one more to give company to its child.
- A single person who wants to experience parenthood adopts a child.
- To control the population, parents may not give birth to their own child.
- If a disease can transfer genetically.
- For the joy of having children without the labour.

- People involved in building their career do not want to consume time for bearing children.
- To help out an infertile friend or a relative.

6.4.2 Types of modern adoption

In this modern world of information technology, there are various types of adoption based on the communication between adopted child and its real mother.

Open adoption: The child and the real mother can communicate after and before adoption.

Semi-open adoption: The real mother keeps communication with the child before adoption and limits her communication after adoption.

Closed adoption: The child and the real mother cannot communicate before and after adoption.

Intra-family adoption: Intra-family adoption refers to a child being legally adopted by a step-parent, after the real parent has remarried, died or not able to care for the child for some reason.

Domestic adoption: Real mother and adoptive parents belong to the same native place.

International adoption: Real mother and the adoptees do not belong to the same country.

6.5 STATUS OF ADOPTION IN INDIA

Most children adopted from India end up in homes in the US, followed by Italy. Data from a reply to an RTI filed by TOI with Central Adoption Resource Agency (CARA) presents the details (Table 6.2 and 6.3) [12].

Table 6.2 Children adopted from India (2010-2013)

S.No	From	To	No of Children
1.	India	US	662
2.	India	Italy	377
3.	India	Spain	149
4.	India	UAE	88

Table 6.3 Children adopted from various states of India (2010-2013)

S.No	State	No of Children
1.	Maharashtra	637
2.	Delhi	299
3.	West Bengal	199
4.	Orissa	137
5.	Karnataka	121
6.	Tamil Nadu	120

From the Table 6.3, it can be noted that the maximum number of children for adoption are taken from Maharashtra during 2010 to 2013.

The Fig. 6.3 shows that the adoption rate from India to US is on decline.

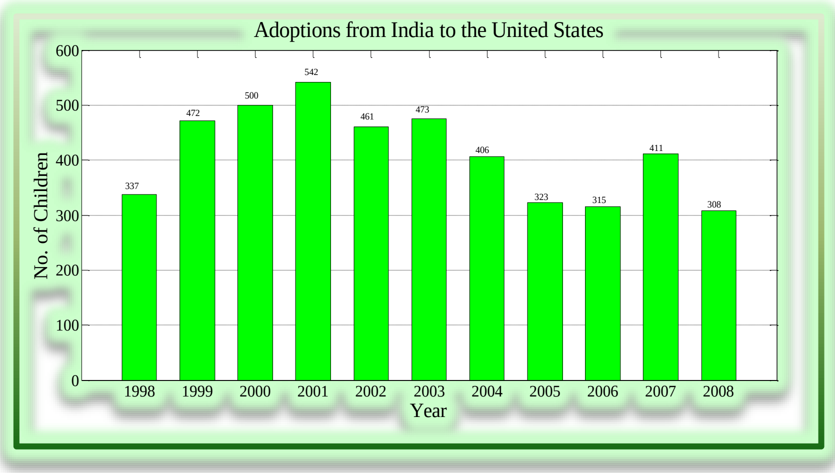


Fig. 6.3 Adoptions from India to US
Source: Central Adoption Resource Agency

As per CARA:

- The ratio of children for intra country and inter country adoption is approximately 80:20.
- Preference is always given to intra country adoption.
- If the child is not selected for intra country adoption, then inter country adoption is preferred.
- Processing fee is Rs.40,000/- for Indians, while NRIs and foreigners pay US $5,000 (about 3 lakh India rupees).

6.6 ISSUES AND PROBLEMS DUE TO ADOPTION

Other than the severe effects on Islamic laws, there are infinite issues and problems that arise due to adoption. This section gives overview of them.

6.6.1 Issues of adopted child

Seven core issues of adoption as researched by Kaplan and Silverstein (1991) are briefed here:

i. **Loss:** Real parents lose their children and adopted children lose their real parents, brothers, sisters and all other blood relatives, forever.

ii. **Rejection:** Adopted children believe that they are rejected by real parents because they are unworthy.

iii. **Guilt and shame:** Adoptees personalize a loss to the extent they feel there is some inherent deficiency in them that caused the rejection and consequently they feel guilt and shame.

iv. **Grief:** Adoptee, real parents and adoptive parents they all suffer with grieve but cannot express before each other. Because adoption is seen and exposed socially as a problem solving event in which everyone gains.

v. **Identity:** Adoption threatens a person of losing his identity, i.e., from where he came, and where he is going.

vi. **Intimacy:** People who have had significant loss in their life fear getting close to others because of the risk of experiencing loss again.

vii. **Control:** All those involved with adoption have been "forced to give up control". There is a crisis whose determination is adoption.

6.6.2 Problems due to adoption

The problems are not confined to the adopted children but also the adoptive parents and real parents face psychic problems other than

many more problems. The problems due to adoption can be categorized as:

- Problems of the adopted child
- Problems of the adoptive family
- Problems of true parents
- Problems of the country of origin

6.6.3 Problems of the adopted child

Adoption is painful, and can present lifelong challenges for everyone involved. There are various problems that an adopted child encounters in the society. The problems of adoptees can be categorized as:

- Psychic problems
- Child abuse
- Health problems

This section briefly describes them.

6.6.3.1 Psychic problems of the adopted child

Psychic problems are common to every adopted child and hence they are discussed in detail. (http://www.amhc.org)

- The grief of these children includes:
    - Feelings of sorrow
    - Ache
    - Sadness
    - Anguish
    - Misery
    - Deprivation
- Grief is a normal and natural response to a loss. Adoption involves a lot of loss.

- The adoptive parents may experience the loss of not giving birth to a child.
- The loss for the adopted child is the loss of the real parents and all the blood relatives

To pretend that adoption isn't about loss is to deny the true grief that affects everyone involved. The other sufferings are:

- The loss of real parents as well as cultural and family relations that would have existed with real parents.
- The anxiety for the 'never meet real family' concept.
- Adoptees hurt their adoptive family by expressing their desire to learn about their real family.
- When adoptive parents and adoptees are evidently dissimilar, people inquire in an unsolicited manner on the appropriateness of adopting a child from another race or culture.
- Adoptees also fall victim to mocking and ill-treatment at school, where other children affront them in an attempt to make them feel ashamed for being adopted.
- The adoptee assumes that his adoptive parents are wicked persecutors, whereas his real parents are the noble parents to whom he owes his love and loyalty.
- The adoptive parents blame the real parents for the weaknesses and deficiencies of the adoptee.

Schechter, a researcher on this subject says [13]**:**

- Adoptees suffer with:
    - Symptoms of depression
    - Feelings of incompleteness
    - Phobic fear of abandonment
    - Anxiety

  - Aloofness
  - Loneliness which makes close relationships impossible.
- Young adopted girls are observed with abnormal attitude such as:
  - Sex-play
  - Exhibitionism
  - Seductiveness
  - Regression.
- Young adopted boys are found with problems such as:
  - Lying
  - Stealing
  - Lack of integration with others

Christopher Ousted (Consultant-in Charge Park Hospital for Children) states that in a group of adoptees they identified the following problems.

- Emotional reactions (tantrums, negativism, jealousy).
- Enuresis
- Anxiety
- Disturbed social behaviour
- Aggression
- Withdrawal
- Stealing
- Cruelty
- Destructiveness
- Lying and encopresis

Further, the adopted children suffer from varying degrees of:

- Parental deprivation
- Neglect
- Parental rejection

Furthermore, at the other extreme, problems that exist with adoptees are:

- Over-indulgence
- Mental or physical illness that weakens the quality of parental love.
- Jealously towards a sibling born soon after the adoption.

The subject experts, Kirschner and Nagel state [13]:

- The adoptee seeks out criminal and antisocial children of a lower economic class than that of the adoptive family.
- Provocative and disruptive behaviour is towards authority figures, notably teachers and parents.
- Adoptees often threaten to run away, and in many cases repeatedly do so.

6.6.3.2 Abuse of adoptees

Child abuse is at extreme for adoptees. According to the National Centre for Victims of Crime (NCVC, 1992) a large proportion of rape committed in the United States is perpetrated by a family member. Research indicates that [14]:

- 46% of children who are raped are victims of family members.
- The majority of American rape victims (61%) are raped before the age of 18.
- 29% of all rapes occurred when the victim was less than 11 years old.
- 11% of rape victims are raped by their fathers or step-fathers, and another 16% are raped by other relatives.

When the real father and the step father rape their daughters in the western society, then the reader can imagine the extreme insecurity to the chastity of an adopted girl.

6.6.3.3 Health problems of adoptees

International adoptees are usually under-immunized and are at increased risk for infections such as:

- Measles
- Hepatitis A
- Hepatitis B

This is due to:

- Populated living conditions
- Malnutrition
- Lack of clean water
- Lack of immunizations
- Exposure to widespread diseases

Challenges in providing care to internationally adopted children include:

- Absence of medical history.
- Lack of availability of real family history.
- Doubtful immunization records.
- Pre-adoption living standards.
- Disease epidemiology in the countries of origin.
- Presence of previously unidentified medical problems.
- Increased risk of developmental delays.

6.6.4 Problems of the adoptive family

Adoptive parents describe horrific behavioural and psychological problems on the part of adopted children [15]. They say they have experienced several problems due to adoptees, such as:

- Multiple school expulsions
- Physical assaults
- Fires
- Psychiatric admissions
- ER visits for self-mutilation
- Sexual acting out
- Stolen credit cards
- Multiple police calls (to give adoptive parents into police), etc.
- Anger of adoptee towards the adoptive parents blaming them they would not care as the real parents.

Moreover, adoptive families are at risk for acquiring infectious diseases secondary to travel or contact with the newly arrived child [9].

6.6.5 Problems with the donor family

Adoption makes the real parents lose their child forever, as if the child has died. This leads to grief. Till their last breath they keep on remembering their child. It is by nature for parents to think and plan well for their children. Since they have given off their child, every moment they wonder about the child's growth, its mental and physical health, its security and many more issues, which they cannot express before public. They always feel guilty for giving off their child to unknown people of unknown origin.

6.6.6 Problems of the country of origin

The demand for healthy children is extremely high in American and European countries for adoption. Adoptive parents are ready to spend more than $50,000 as fees and travel expenses. This cost gets multiplied by thousands of times due to corruption in many

countries. Numerous countries, including Guatemala and Vietnam, have experienced problems such as:

- Judges and lawyers taking bribes
- Gangs or even police stealing children

In response to such charges, several countries throughout the world have decided to put a halt to inter country adoptions [16].

6.7 THE DECLINE IN ADOPTION WORLDWIDE

Russia has banned adoptions overseas. China and Guatemala formed new laws to reduce number of adoptions abroad.

The Fig. 6.4 shows the data on the decline in the number of international adoptions collected from the US State Department [17].

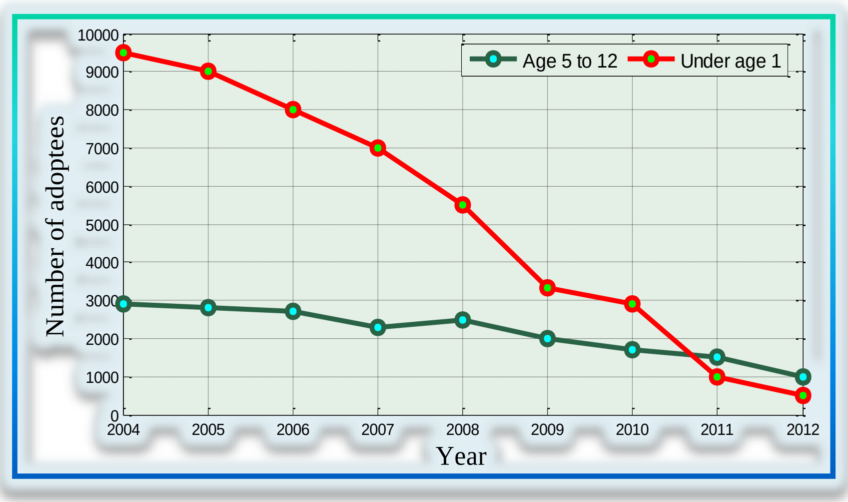


Fig. 6.4 Decline in international adoptions
Source: US state department

The following graphs (Fig.6.5 to 6.7) show the adoption worldwide [18].

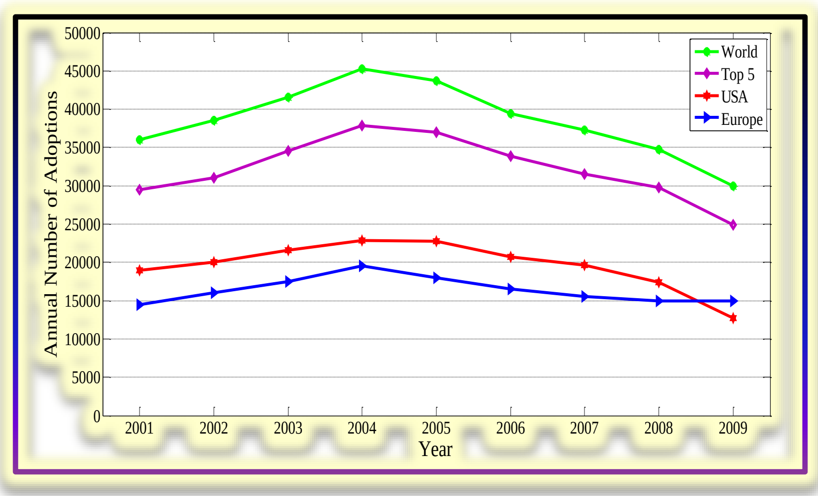


Fig. 6.5 Adoptions from top four source countries, 2001-2009

It can be observed from the Fig. 6.5 that the adoption worldwide has reduced. The countries which were top in adopting are also showing decline in adoption. Adoptions are reduced sharply in US but in Europe, the recent decrease is not sharp.

Fig.6.6 shows adoption in four European countries and Canada. In Spain and France it is at decline. In Canada and Sweden it is constant. In Italy it is slightly increased.

Trend of inter-country adoptions in China as origin country is on sharp decline. In Guatemala it has gone to zero (Fig.6.7). In Ethiopia children for adoption were given off due to extreme poverty till 2009.

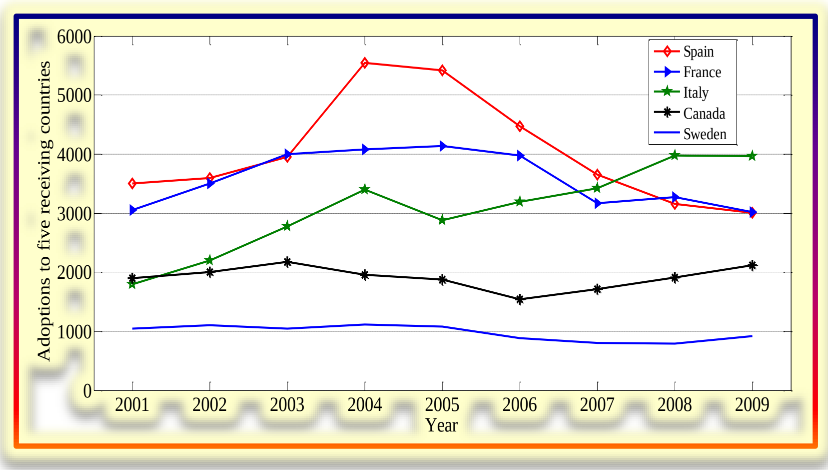


Fig.6.6 Adoptions to five receiving countries, 2001-2009

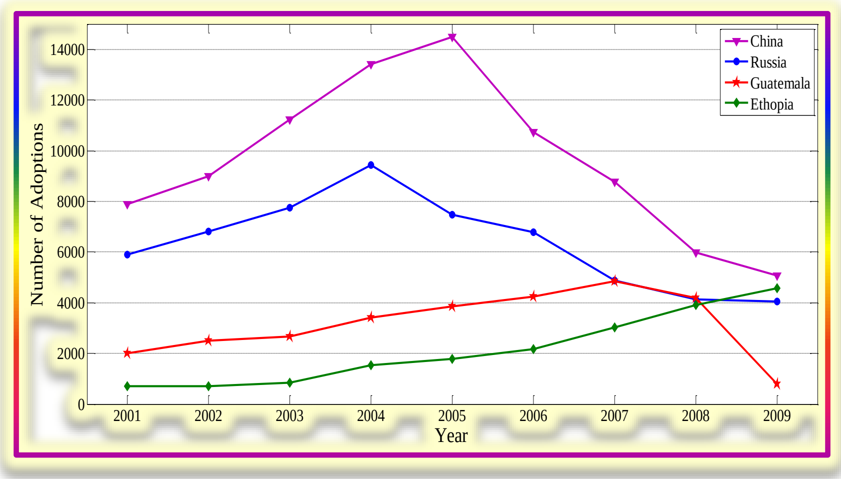


Fig. 6.7 Trends in inter-country adoption, 2001-2009

Due to the problems faced by adoptees, even Ethiopia has reduced the supply of children for adoption, as can be seen in Fig, 6.8.

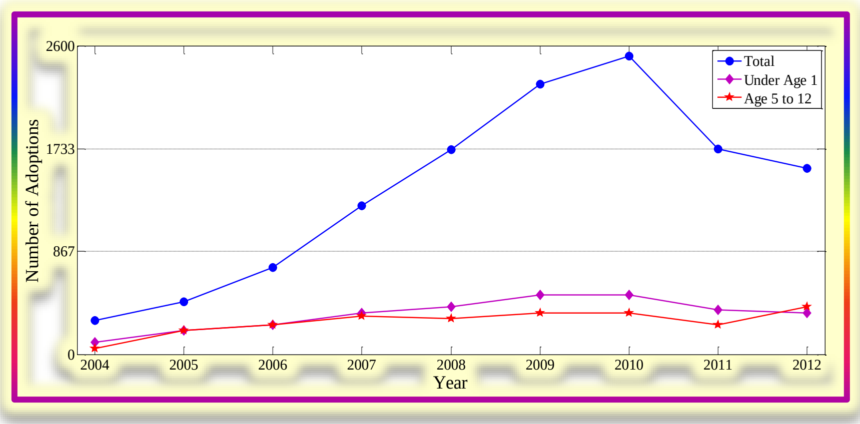


Fig. 6.8 Decline in number of adoptees from Ethiopia
Source: US state Department

Fig.6.9 shows the number of accepted placement proposals in 2011–13. The decline is consistent with the worldwide trend of decreasing numbers of inter-country adoptions [19].

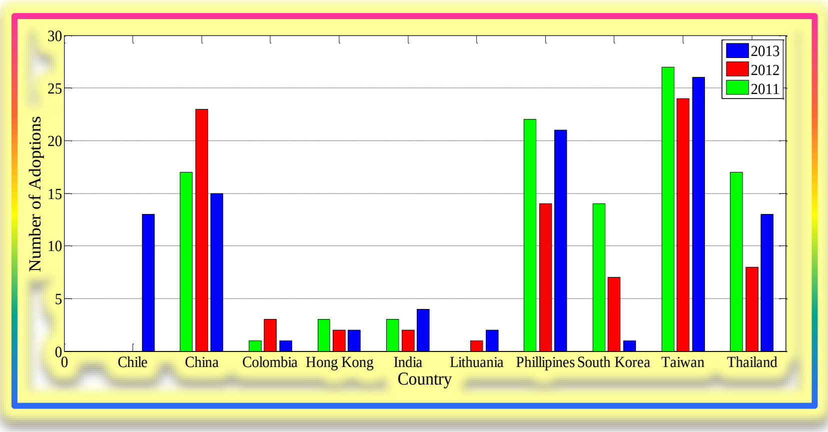


Fig. 6.9 Inter-country adoption on decline

6.7.1 Decline in US adoption rates

As stated, in US the adoption rate is on decline. In 8 years of duration the adopted children have reduced from 21,400 to 9,504 (Table 6.4).

Table 6.4 Decline in US adoptions

S.No	Year	Adopted Children
1.	2003-2007	21,400
2.	2008-2010	13,700
3.	2011	9,504

The decade between 1995 and 2005 was a high point in adoptions by U.S. citizens of children from other countries, as can be seen in the graph (Fig.6.10) [20].

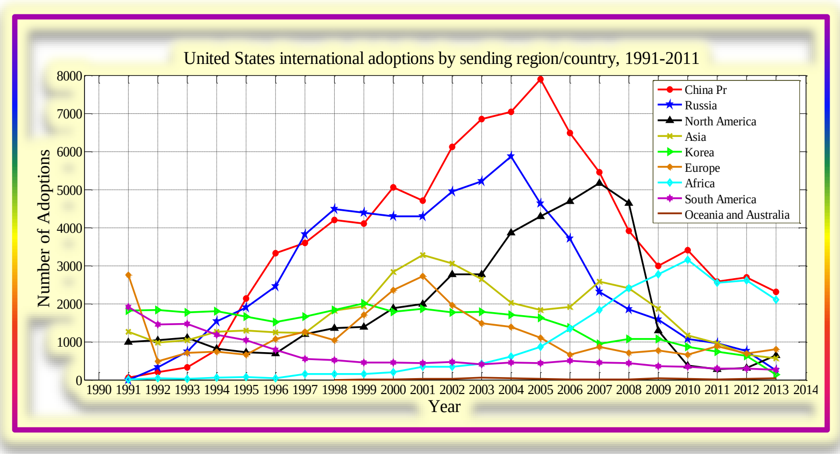


Fig. 6.10 Adoption in US at decline

It can be observed that in the year 2005 there were maximum adoptions (8000) from China and reduced (below 3000) in 2011. In year 2004 there were maximum adoptions (near 6000) from Russia and reduced (below 1000) in 2011. Presently Russia has banned inter-country adoptions.

Fig. 6.11 shows inter country adoptions to US along with the fertility rate. It can be observed that adoption is at decline since 2004 to 2012.

The reasons for the decline in adoption are several. The major reason is reported by *Time* magazine as:

> *"... a combination of forces in the developing world, from reform efforts to economic growth to growing nationalism, is turning the attitude against the practice (of adoption), even in countries where kids may need the most help."*

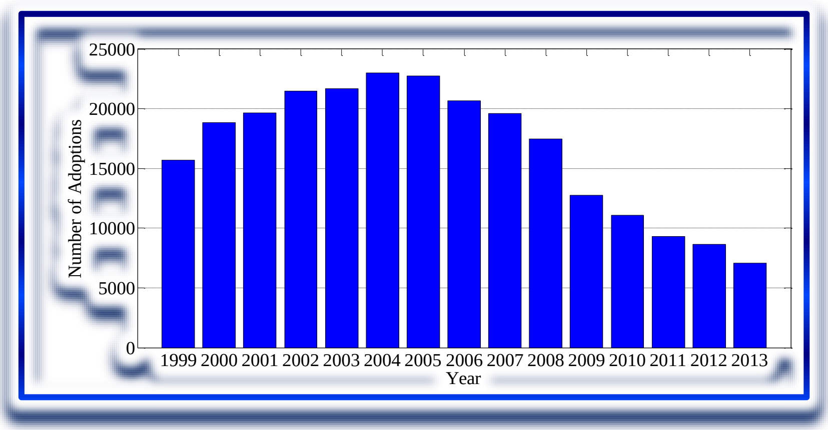


Fig.6.11 Inter-country adoptions to US
Source: US state department

6.8 RE-HOMING OF ADOPTED CHILD

Presently, Americans are forsaking adopted children and searching online for other families to take them.

Failed adoptions are far more common than one might imagine. According to statistics from the federal Children's Bureau:

> *"As many as 10 percent of adoptions are severed".*

Since countries such as Guatemala and China close their international adoption programs or implement strict new rules, the pool of adoptable children has shrunk dramatically in recent years [21].

Since late 1990s, Americans have adopted about 243,000 children from other countries. When failure rate of international adoptions becomes similar to the rate at which domestic adoptions fail, then, the federal government expectation of adoption failures range from about 10% to 25%. Hence, more than 24,000 foreign adoptees will no longer be with the adoptive parents [22].

6.9 ADOPTION FROM THE ISLAMIC POINT OF VIEW

In Islam, relation can be due to three reasons.

i. **Blood relation:** Children born due to the marital relation of the husband and wife will have two kinds of relations, one is maternal and the other one is paternal.

ii. **Foster relation:** If a child, below two years, was under fosterage by a woman, then the foster relation will develop. This relation is limited to the foster parents and their children, and confined to the illegality of marriage. Forster relatives cannot inherit just because of fosterage.

Maintenance cannot be claimed due to a foster relation, nor can the right of patron-ship (Wilayet) be claimed.

iii. **Marital relation:** This is the only relation that can be developed due to the 'Proposal and Acceptance' in the presence of witnesses.

A marital relation is the only relation developed due to exchange of words. No other relation can be formed this way. For instance, if a lady is declared as mother, she cannot become a mother. Hence, in the Quran, Allah states [23]:

> *"Such of you as put away your wives (by saying they are as their mothers) - They are not their mothers; none are their mothers except those who gave them birth - they indeed utter an ill word and a lie. And Allah is Forgiving, Merciful".*

One more similar verse exists in the Quran on this topic [24]:

> *"Allah has not assigned unto any man two hearts within his body, nor has He made your wives whom you declare (to be your mothers) your mothers, nor has He made those whom you claim (to be your sons) your sons. This is but a saying of your mouths. But Allah says the truth and He shows the way".*

Similarly, the relation between the father and son cannot be formed through exchange of words. The best example is of Hazrath Zaid who was once adopted by the Prophet (PBUH).

Hence, from the above examples it is clear that the relation between parents and children cannot be formed merely through exchange of words. It is the strong blood relation, through which maternal and paternal relations arise.

6.10 EFFECTS OF ADOPTION ON ISLAMIC LAWS

Adopting a child is not a simple task. It is not confined to the nourishment of the child. Many other issues are connected to this issue. For, instance the network of all the Islamic family laws will be affected, such as:

- The law of marriage
- The law of inheritance
- The law of will
- The law of patron-ship
- The law of 'Hazanat' (Right of nourishing the child)
- The law of maintenance
- The 'Purdah' system

This section briefly explain these issues

6.10.1 Effects on the law of marriage

On the adopted child all the paternal and maternal relations, children of the parents who adopted and their brothers and sisters become illegal (for marriage). Children of the adopted son/daughter become illegal for them and vice versa. Also, the wife of the adopted son and the husband of the adopted daughter become illegal for parents. As stated in the Quran [25]:

> *"Forbidden unto you are your mothers, and your daughters, and your sisters, and your father's sisters, and your mother's sisters, and your brother's daughters and your sister's daughters, and your foster-mothers, and your foster-sisters, and your mothers-in-law, and your step-daughters who are under your protection (born) of your women unto whom you have gone in - but if you have not gone in unto them, then it is no sin for you (to marry their daughters) - and the wives of*

your sons who (spring) from your own loins. And (it is forbidden unto you) that you should have two sisters together, except what has already happened (of that nature) in the past. Lo! Allah is ever Forgiving, Merciful".

Hence, a very huge group of relatives become illegal for the adopted child and vice versa.

As Islam does not permit an illegal to be treated as legal, similarly, it does not permit a legal as illegal:

"O Prophet! Why ban you that which Allah has made lawful for you, seeking to please your wives? And Allah is Forgiving, Merciful"[26].

6.10.2 Effects on the law of inheritance

The second consequence of adoption is the effect on laws of inheritance. Parents inherit from their children and children inherit from their parents. When parents or children are alive some of the relatives will be hidden and do not inherit. Some of the relatives get reduced inheritance in this case. Hence, when a child is adopted and treated as a real child, the inheritance share of almost all the true relatives will get badly affected.

6.10.3 Effects on the law of will

Adoption will even affect the law of 'Will' (Wasiyah). The will cannot be in favour of a legal heir. Non-heir can only get benefitted through the will. Hence, Prophet Mohammad (PBUH) declared on the occasion of Haj that:

"Allah has specified the shares of all the heirs in inheritance hence there is no will in favour of the heir".

For instance, a person could write his will in favour of a child. But when the child is adopted by him, then there is no will possible in his favour. Similarly, the adopted child cannot make any will for the parents who adopted it.

6.10.4 Effects on the law of gift

Laws of a gift are also affected due to adoption. For instance if something is gifted it can be taken back, provided certain conditions are fulfilled. But if it is gifted to a Mahram relative, it cannot be taken back. For example, if the father has gifted a house to his son he cannot take it back. The well-known book of Hanafis, i.e., Al-Hidaya states [27]:

> *"If a person gifts to his Mahram relative, then the gift cannot be taken back".*

As the Prophet (PBUH) said:

> *"When the gift is gifted to a Mahram relative it cannot be taken back".*

Hence, if the gift is gifted to the adopted child, it cannot be taken back and the Islamic laws of gift fail to work here.

6.10.5 Effects on the law of patron-ship

Adoption effects even the laws of 'Wilayet' (Patron-ship). The father has right to take decision for his minor child. A well-known Muslim jurist Allama Samarqandi sates:

> *"The right of Wilayah is with the paternal relatives".*

He can arrange marriage of his minor child in some of the cases and can utilize the assets of his child. The well-known book of Hanafis, Durr-e-Mukhtar states [28]:

> *"The right of Wilayah means imposing our view on other's view, whether the later person accepts it or not".*

Similarly, when a girl is asked her permission for her marriage, her silence or laughter shall be considered as a positive response.

In all these situations, when a child is adopted, rights of the child are seized by the parents, due to the concept of Wilayet.

6.10.6 Effects on the law of 'Hazanat'

The concept of Adoption also affects the laws of 'Hazanat'. 'Hazanat' means the right of taking the responsibility of a child's nourishment. In Islam a woman is given priority over men for taking this responsibility. Hence, the mother, maternal aunt or maternal grandmother is given priority over the father, paternal aunt and paternal grandfather. Hence, the Al-Hidayah states [29]:

> *"The mother has more right to nourish the child. In the absence of mother, the maternal grandmother has this right over the paternal grandmother, even if the maternal grandmother is of far-level. In case the maternal grandmother is absent, the right goes to the paternal grandmother and she shall be given priority over the sisters. In the absence of paternal grandmother, sisters are given priority over the maternal and paternal aunts. Then the maternal aunts are of more priority than the paternal aunt, and as per Imam Abu Hanifa: The maternal aunt has priority over the sisters".*

When the adopted child is treated equivalent to the real child, then the mother, aunt or sister shall have the right to nourish him. In fact they cannot prove themselves efficient in this matter. The true love and affection that reflects in blood relations cannot be visible here.

6.10.7 Effects on the law of maintenance

The law of maintenance is also related to the closeness in relation. The father is responsible towards his son and in some cases this responsibility gets shifted to the paternal grandfather and paternal uncles. Similarly, when the son can maintain and the father is needy, then the son should provide maintenance to both parents. In some situations this responsibility falls on the nephew and paternal grandson. Jurists have specified this law as:

> *"The maintenance of every Mahram minor male or female relative (even if she is major) or the minor male children who are handicap and not able to earn and are needy is obligatory. The ratio of maintenance is proportional to the share of inheritance that the relative is entitled to receive, since the Quran states that the heir has obligation of discharging maintenance proportional to his share in inheritance".*

When the adopted child is treated as real child, the person who has obligation of providing maintenance will be liberated from the responsibility. The one who is not responsible for providing maintenance will have to provide it.

6.10.8 Effects on the 'Purdah' (Hijab: veiling) system

One more problem that may arise is of 'Purdah system' (Veiling of women) in Islam. As per Islamic view a Muslim woman can uncover her face, hands, head, foot, bottom parts of legs before her Mahram relatives. Hence, Al- Hidayah says [30]:

> *"A man can see the face, hands, head, foot, bottom parts of legs of his Mahram relative-women, but cannot see her back, front (upper body) and upper parts of legs.*

In case the adopted child is male, then the mother who has adopted him shall observe 'Purdah' from him. Similarly, if the adopted child is female, the father who has adopted her should make her observe 'Purdah' from him. When the adopted child is treated as the real child the 'Purdah' system fails to function.

There are many more laws and issues which have direct or indirect effect of adoption.

6.11 LAWS OF NATURE

If pondered properly, Islam is found close to the laws of nature. It is the fact that the relation between parents and children is by nature. Children inherit different qualities of parents. Even the science of genetics proves that the parents and their children form an identity for each other.

Similarly, the love and affection of parents for children is natural. The respect of parents by the children is also by nature. Even if the children are disobedient, parents' affection for them continues. The same is not true for the adopted children. The adopted children sometimes dislike the adaptive parents, thinking that they have lost the originality of their race. Sometimes the adopted children hate their real parents, blaming them for not giving appropriate attention to them. Consequently, many crimes take place in this background. Sometimes the adopted girl face sexual harassment by her adaptive father and sometimes the adopted son kills the parents who adopted him. Details are discussed in the previous sections.

The concept of the adopted child is like a robot which can assist us in our routine work but cannot have any emotional relation with us.

The relation between parents and their children is permanent and cannot be developed or broken by mere words. The relation which can be formed due to a dialogue can be discontinued through a dialogue. The blood relation can never be broken through any dialogue, nor can be formed through a dialogue. As stated by Quran [31]:

> *"He the god who has kept love for your children in your hearts".*

6.12 FACTS BEHIND ADOPTION

It is usually said that adoption is optional i.e., this concept does not compel anyone to adopt a child compulsorily. But if someone thinks deeply on it, it comes under the 'law by compulsion'. It is true that the person who has adopted has adopted optionally, but all his relatives get affected consequently. For instance, if his wife is not convinced with this adoption, it is compulsion on her to accept the adopted child. Similarly, the other relatives whose rights are getting affected may not be satisfied with adoption, but will have to accept it unwillingly. It is usually said that the aim of adoption is to help the poor and needy children. But practically, in India, there is no such aim found behind adoption. Usually, the couples without children have tendency of adopting children for their own sake. While adopting children they prefer the child of their religion and their caste. A child from a poor and needy family is never given the preference. Hence, the purpose of adoption has never been to help the poor or needy, the purpose has been to patch up one's deficiency.

6.13 SAFEGUARDING THE NEEDY

It must be made clear that the Islamic law of safeguarding the poor and needy does not leave any child homeless. This law is implemented at two levels, i.e., Individual and social.

At individual level, Islam has never stopped any one from safeguarding the poor and needy. The only thing that is prohibited is their adoption as children. For example if a Muslim takes the responsibility of nourishing an orphan, then it is not only permitted but appreciated. However, the race of orphan continues to be the original, he/she shall be referred with the father's name. Laws of inheritance, maintenance etc., do not get affected. Further, the person who is supervising can gift some of the assets or make a will (not more than 1/3 of the assets) for the needy and orphans.

If a child does not have any relative, it is the responsibility of Islamic state to safeguard the child. In case the state is not Islamic then the Muslim society should safeguard him/her. As the Prophet (PBUH) said:

> *"If anyone has left assets, they are for the heirs and if anyone has left loans or the needy (children or old people) I am responsible for safeguarding them. The one who does not have any patron I am his patron" (Masnad-e-Ahmed, 4/182).*

The Prophet (PBUH) was not only a preacher, a guide; he was also the head of the Islamic state. As the head of the state it was his responsibility to safeguard the poor and needy people. Hence, it is the responsibility of the Islamic state to take care of them and when the state is not Islamic the Muslim society should safeguard them.

6.13.1 The modern debate on safeguarding the needy

The societies which usually claim child welfare, announces the goodness of safe-guarding the orphans and needy within their own families or communities. They say that adoptions should be preferred domestically.

Some advocacy groups state that the best way to improve the lives of needy children is to provide services and support for families in their home countries.

Bissell from UNICEF states: ”There's an increased ability of countries to take care of their children and a desire to do so." (http://www.npr.org).

6.14 CONCLUSION

The teachings and the laws that are provided by Islam have proved themselves to be divine. Those who used to favour adoption are gradually going against the concept due to the practical problems faced by the adoptees, real parents and the adoptive parents. Sometimes, human beings try to oppose the laws of nature but finally realize that this opposition leads the society to destruction and annihilation. The decline in the adoption rates worldwide is a proof. Hence, the divine Islamic laws shall be followed by the mankind for its own welfare. Avoid adoption and prefer safeguarding the interest of poor and orphans at individual as well as social level.

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CHAPTER 7

INHERITANCE OF AN ORPHAN PATERNAL GRANDSON

7.1 INTRODUCTION

Presently, the whole world is circling around money. Most of the global wealth systems believe in concentrating money for their own benefit. In contrast, Islam preaches distribution of money, as stated in Quran [1]:

> *"That which Allah gives as spoil unto His messenger from the people of the townships, it is for Allah and His messenger and for the near of kin and the orphans and the needy and the wayfarer, that it become not a commodity between the rich among you. And whatsoever the messenger gives you, take it. And whatsoever he forbids, abstain (from it). And keep your duty to Allah. Lo! Allah is stern in reprisal".*

Similar to other money matters, Islam takes care of proper distribution even in case of inheritance. In some religions only the eldest son gets inheritance. In some other religions only sons get inheritance but not the daughters.

Islam has given the detailed law for the distribution of inheritance. The basic principle of inheritance distribution is given in the verse of the Quran [2]:

> *"Unto the men (of a family) belonged a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether it be little or much - a legal share"*

Primarily, as long as a person is alive no one can inherit his assets. A son or a daughter cannot claim inheritance from the father during his life. Similarly, the right on inheritance will be owned by only those who are alive, when the subject has died. Heirs, who die before the subject dies, do not inherit anything. For instance, if a man has three sons and two daughters and if incidentally one son and a daughter die during lifetime of the subject, then as per rules, they (dead) are not the inheritors.

Secondarily, the distribution of inheritance is not as per the requirement but it depends on the closeness in relation. For instance, if a person has a few relatives rich and a few poor, then it is not possible to give more inheritance to the poor and less to the rich.

The Quran has specified which relation is more close to the subject. Accordingly, rules are designed. People who are closely related get more inheritance and who are far related get less or no inheritance. Depending on this rule, grand parents do not inherit when parents of the subject exist. Similarly, grand children do not inherit when children exist.

Few people think that if a person has many sons and if any one dies, then children of the dead son should inherit from the grandfather. Similarly, if a person has many daughters and if a daughter expires then her children should inherit from the grandfather. This is not logical.

7.2 INHERITANCE OF AN ORPHAN PATERNAL GRAND SON AS PER THE QURAN

- In the assets of grandfather and grandmother, grandchildren get their inheritance through parents. In case, their parents are expired then they cannot inherit

anything from grandparents. Grandchildren could inherit only if parents are alive when grandparents expire.

- It is possible that grandchildren are needy. But need is not the base for inheritance. Inheritance depends on the closeness in relationship.
- When the subject's children are present, grandchildren cannot be the heirs even if they are orphans.

Hence, when the son is present the grandson cannot be the heir. This rule is given in the Quran and it is not formulated by the jurists.

7.3 INHERITANCE OF AN ORPHAN PATERNAL GRAND SON AS PER HADITH

The Quran assigns fix shares to some of the heirs. Such heirs are termed as 'Dhawi-al-Furud' (Sharers). Children are not among the sharers instead they are considered residuaries. Hence, children get the remaining amount after sharers are given their shares. From a Hadith this is made clear:

The Prophet (PBUH) said:

> *"Give the shares of inheritance to the specified shares, then the remaining shall be given to the nearest male relative"* [3].

From this Hadith it is made obvious that after giving shares to the sharers specified (by the Quran), the residue or the remaining amount shall be given to the male relative who is the closest in relation. Hence, when the son is present, the grandson cannot be the closest relative. Moreover, grandchildren do not come in the category of sharers.

7.4 INHERITANCE OF AN ORPHAN PATERNAL GRAND SON AS PER THE COMPANIONS

Among the companions of Prophet Mohammad (PBUH) Hazrath Zaid bin Sabith (RAA) was well known for his knowledge on the law of inheritance.

As the Prophet (PBUH) said:

> *"Among my companions Zaid has the best knowledge of the laws of inheritance"[4].*

Hazrath Zaid's Fatwa is present in Sahi Bukhari as [5]:

> *"The subject's paternal grandchildren fall under the category of sons. If there is no son the paternal grandson is treated as equivalent to the son and inherits accordingly. Similarly, when there are no daughters (and sons) the paternal granddaughter (in the absence of grandsons) is treated equivalent to the daughter and inherits accordingly. As the son hides descendants in his presence, the grandson hides far-descendants. In the presence of a son, the grandson cannot be the heir".*

7.5 CONSENSUS OF THE UMMAH

The Ummah (Followers of Prophet Mohammad (PBUH)) is united in its ruling that grandchildren cannot be the heirs when children exist. Hence, Allama Ibn-e-Hazam Zahiri says [6]:

> *"In the presence of a son, the grandson cannot be the heir, whether his father is present or the father's brother. This is made clear by the Prophet (PBUH) and the whole Ummah is united on it with surety",*

Thus, from the Quran, Hadith, Companions and the unity of Ummah, it is very obvious that in the presence of a son, the grandson cannot be the heir.

7.6 THE LOGICAL REASONING

Whatever is explained above is logical. If it is assumed that the orphan's dead father is present while distributing inheritance, then why is the same logic not followed in many other cases. For instance, inheritance can be shared with grandparents in the presence of parents, as the grandparents are usually needier due to their old age.

Similarly, in the presence of a son, brothers and sisters get hidden, though they might be needier than the son. Hence, just the need cannot make any one the heir. In the presence of close relatives, farther relatives are always deprived, so also the grandchildren in the presence of children.

7.7 SOME OF THE DOUBTS

Regarding the inheritance of grandchildren there is no legal or logical reasoning. Usually, people speak in emotion stating that the poor fellows (orphan grandchildren) if could get inheritance from grandfather, it would be more appropriate for their nourishment. This aspect should be focused through various angles:

- It is not necessary that orphan grandchildren are poorer than their paternal uncles. Most of the time, after the death of a son, the grandfather bends towards the grandchildren for their nourishment. They get educated and withstand almost equivalent to their father's brothers. Hence, it is not necessary that the uncles are richer than the grandchildren.

- It is not logical to give assets to those children whose father has expired, and debar those children whose father is alive. The father may consume whatever is given and leave nothing for his children while dying.
- It is not logical to care only paternal and maternal grandchildren and debar paternal and maternal grandparents.
- Laws of inheritance distribution are based on the closeness in relation. If the requirement is made the base for inheritance distribution, then what shall be new laws?
- Nourishment is not the purpose of inheritance distribution. If it is made the purpose, then how the children shall be nourished, when their father has not left any assets.

The issue of inheritance of the orphan paternal grand child is against realities. Neither the Islamic law favours it nor is it logical.

7.8 A SOLUTION TO THE PROBLEM

If a maternal or a paternal grandfather is willing to care for the grand children, there are other legal ways to do it. For instance:

- Hiba (Gift): The grandfather can gift a big asset to his grandchildren. There is no limit on it. The gift can be more than the share in inheritance. Moreover, when the asset is gifted to a 'Mahram' then it cannot be taken back.
- Wasiyah (Will): The grandfather can prepare a will that a particular amount (not more than 1/3 of the total assets) from his assets can be given to the grandchildren after his death. It is also possible that the assets that grandchildren

receive as gift are more than the share in inheritance that their uncles have received.

- The gift and will are the options that can be adopted as solutions to the problem under discussion. Whereas maintenance of the orphan grandchildren is an obligation for the grandfather. In the absence of grandfather, uncles are responsible for their maintenance.

As the closeness in relation is the basis for inheritance distribution, the closeness in relation is the basis for providing maintenance. Jurists have elaborated this issue as:

Maintenance of 'Mahram-relatives' is obligatory if they are minor and needy, for a girl it is mandatory even if she has attained puberty, for needy men also when they are handicap or blind. This maintenance is in accordance with the ratio of inheritance distribution. People on whom maintenance is a responsibility, they shall be compelled to provide maintenance.

> *"If Dhawi-al-Arham (far blood relatives) are rich, then their maintenance is not a responsibility. Similarly, maintenance of old aged men is not a must if they are healthy to earn even if they are needy. If among far blood relatives, old aged women are there then their maintenance is a must even if they are healthy but needy"* [7].

Allama Ibn Abideen Shami states on maintenance [8]:

> *"If the father has no sufficient livelihood, then the paternal grandfather, mother, paternal uncle or maternal uncle shall be compelled to provide the maintenance of his minor children. Once the father becomes well-off then the expenditure can be claimed back. Similarly, if near-relatives*

do not exist then far-relatives shall be compelled to provide the maintenance".

Hence, the maintenance of an orphan is obligatory on paternal and maternal uncles. Execution of this instruction is mandatory; it is not just a suggestion or an alternate. The Quran speaks on the obligation of heirs in providing maintenance [9]:

"Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No-one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born (be made to suffer) because of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father). If they desire to wean the child by mutual consent and (after) consultation, it is no sin for them; and if you wish to give your children out to nurse, it is no sin for you, provided that you pay what is due from you in kindness. Observe your duty to Allah, and know that Allah is Seer of what you do".

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CHAPTER 8

WOMEN'S RIGHT OF SUCCESSION

8.1 INTRODUCTION

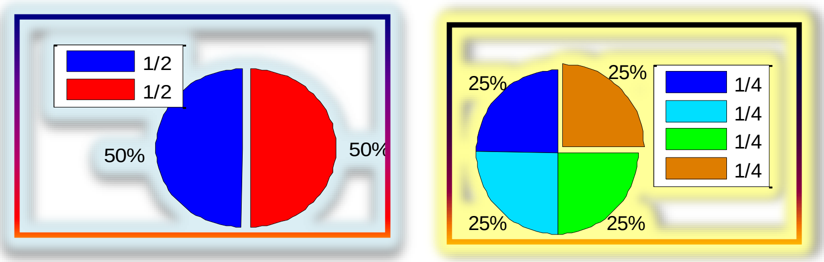
Before the advent of Islam, the known religions of the entire world had not given any right of succession to women. Arabs believed that those (men) who can defend and protect their tribes during wars shall only have the right to inherit. In Judaism, the eldest son was considered the only heir. Even in Hinduism, women have no right of inheritance. Even till 19^{th} century, Western countries did not give any right to women on inheritance.

The Islamic law gives the right of succession to women. The mother should inherit as the father should inherit, the daughter should inherit when the son inherits, and the wife should inherit when the husband inherits and so on. Today the whole world believes that women should have the right of inheritance. This change is the gift of Islam to the world.

8.2 WOMEN AS SHARERS

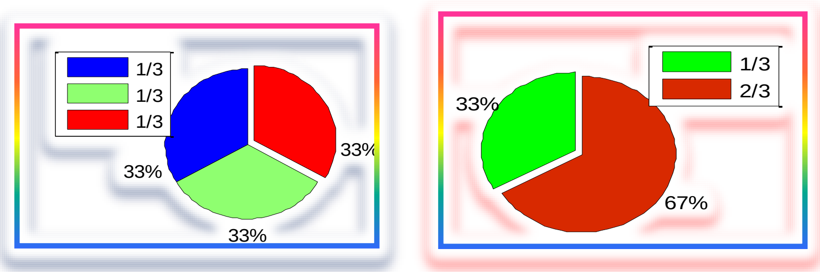
As per the Islamic law six relatives are considered prime heirs, i.e., their share in inheritance is sure. Out of these six relatives, three are women (Mother, wife and daughter) and three are men (Father, husband and son). As per the classification of heirs, there are three categories. One among them is that of 'sharers' called as (Dhawi-al-Furud in Arabic). Sharers are the heirs whose share is specified either in the Quran or in Hadith. Altogether, in 7 cases men fall under sharers but in 17 cases women fall under this category.

The meaning of basic shares is explained in Fig. 8.1 to 8.3. The details of the actual shares are explained in Table 8.1.



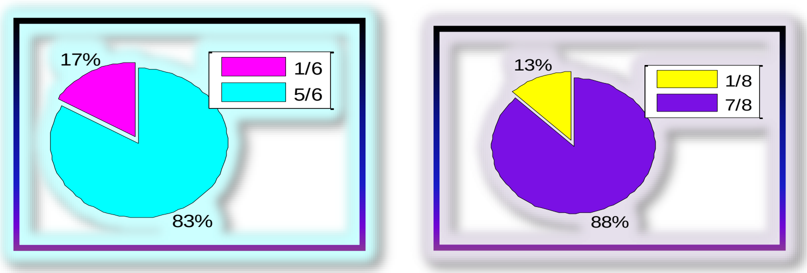
(a) (b)

Fig. 8.1 a) 1/2 share b) 1/4 share



(a) (b)

Fig. 8.2 a) 1/3 share b) 2/3 and 1/3share



(a) (b)

Fig. 8.3 a) 1/6 share b) 1/8 share

Table 8.1 Woman as sharer in 17 cases

S.No	Share	Sharers	
1.	2/3	2 or more daughters	2 or more paternal grand daughters
		2 or more sisters	2 or more consanguine sisters
2.	1/2	One daughter	One paternal daughter
		One sister	One consanguine sister
3.	1/3	Mother	2 or more uterine sisters
4.	1/6	Mother	Grandmother
		Paternal granddaughter	Consanguine sister
		Uterine sister	
5.	1/4	Wife	
6.	1/8	Wife	

It can be observed that some of the shares are 2/3 and 1/2 for women sharers, whereas among men sharers no one can inherit this much heavy proportion, except the husband (when his wife does not have any child).

8.3 PROPORTION OF INHERITANCE FOR WOMEN WHEN COMPARED TO THAT OF MEN

There are four possible cases when the magnitude or proportion of inheritance is compared for men and women.

- When a woman gets half that of a man of equal level
- When a woman gets equal to that of a man
- When a woman gets more than that of a man
- When a woman is a heir but a man is not a heir

Purpose is not to explain the details but to give an overview of this topic.

8.3.1 When a woman gets half that of a man

There are various cases when a woman gets half that of a man that is in the 1:2 ratio. These cases are explained in Table 8.2.

Table 8.2 A woman's share as half when compared to that of a man

S.No	Relativity	Explanation
1.	Daughter with son	When a daughter exists along with the son then they inherit in 1:2 ratio
2.	Mother with father	1:2 when there is a husband/wife and children do not exist
3.	Sister with brother (Own or consanguine)	1:2 when parents and children do not exist
4.	Wife with husband	1/4:1/2, when children do not exist 1/8:1/4, when children exist

8.3.2 When a woman inherits equal to that of a man

Few cases when a woman gets equal to that of a man in inheritance are explained in this section.

- When a deceased leaves at least a son, then both parents inherit equally, with each 1/6. If a woman leaves a daughter, husband and parents, then also both parents inherit equally (see example 8.1).
- Uterine brothers and sisters inherit in 1:1 ratio.
- If there is only one heir, then he or she inherits the total inheritance irrespective of the gender. For instance if the daughter is the only heir, then she inherits 1/2 as sharer and the remaining 1/2 as residuary.
- In some cases, a sister gets equivalent to that of a brother.

- In some cases, the brother and the uterine sister inherit equally.

Example 8.1: Deceased leaves a) a son and parents b) daughter, husband and parents.

Solution 8.1:

Case a: When a deceased leaves a son, mother and father, then both parents fall under the category of sharers and inherit $1/6^{th}$ each. The son is a residuary and hence gets the residue (Fig. 8.4a).

Case b: Single daughter inherits 1/2. Husband gets 1/4, mother gets 1/6 and 1/6 is for father as sharer and there is no residue left for the father to collect. In this example,, the sum of shares is crossing unity hence the shares are normalized as per the doctrine of 'Awl' and then distributed as shown in Fig. 8.4b.

- Daughter=1/2
- Husband=1/4
- Father=1/6
- Mother=1/6
- Sum=1/2 + 1/4 + 1/6 + 1/6>1

Hence, the doctrine of 'Awl' is to be implemented.

Sum = 6/12 + 3/12 + 2/12 + 2/12

= (6+3+2+2)/12

= 13/12

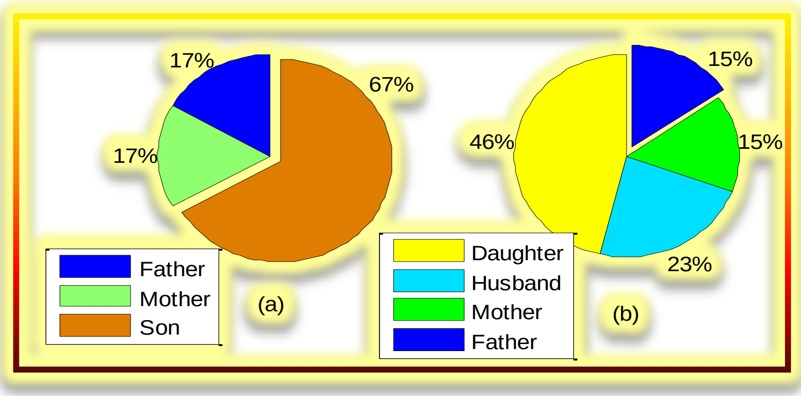
As per the doctrine of 'Awl', the numerator shall be made equal to the denominator, i.e.,

=13/13

Hence, daughter=1/2 = 6/12 ≅ 6/13 =46%

Husband =1/4 = 3/12 ≅ 3/13= 23%

Father = 1/6 = 2/12 ≅ 2/13 = 15%

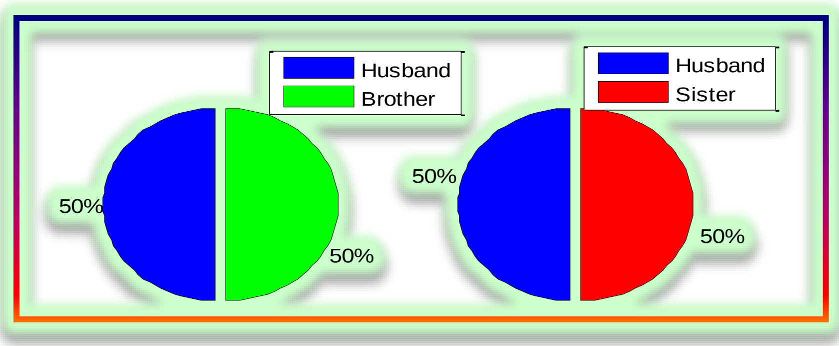


(a) (b)

Fig. 8.4 Pie diagrams for example 8.1 a) case a and b) case b

Example 8.2: If there is the husband and a) one brother or b) one sister then how the inheritance is distributed.

Solution 8.2: As the husband is one of the prime sharers and there are no children to the deceased, he will get 1/2 of the inheritance. The remaining inheritance can be distributed among other shares or residuaries as (Fig. 8.5a and b):



(a) (b)

Fig. 8.5 Pie diagrams for example 8.2 a) case a b) case b

Case a: Brother is the residuary and hence gets the residue that is remaining half.

Case b: In case there is one sister, she gets 1/2 of the inheritance as the sharer.

Example 8.3: If a woman leaves the husband, mother, uterine sister and a full brother, how inheritance is distributed?

Solution 8.3: Since there are no children to the woman:

- The husband gets 1/2 of the inheritance (Fig. 8.6).
- Since she has one full brother and one sister (uterine), her mother gets 1/6.
- The uterine sister's share is fixed as 1/6.
- The full brother gets the residue that is: 1-1/2-1/6-1/6=1/6.

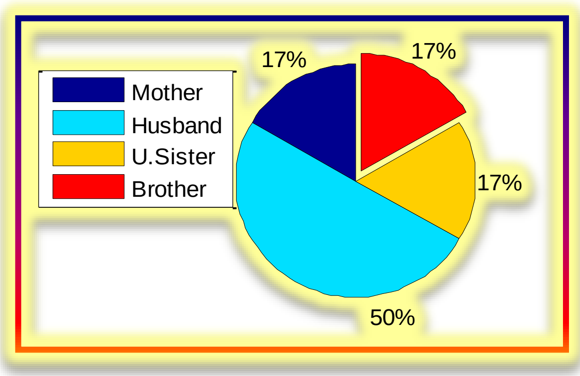


Fig. 8.6 Pie diagram for example 8.3

Note: Share of the uterine sister is equal to that of the uterine brother.

Example 8.4: Explain the distribution for the following cases:

a) If a women leaves the husband, mother and uterine brother
b) If a women leaves the husband, mother and uterine sister

Solution 8.4: Since the women has not left any child:

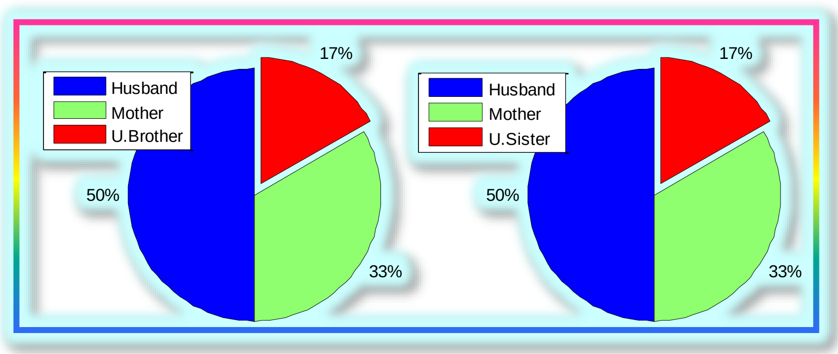
Case a:

- The husband=1/2
- The mother=1/3
- The uterine brother=1/6

Case b:

- The husband=1/2
- The mother=1/3
- The uterine sister=1/6

The details are plotted in Fig. 8.7. It can be seen that the uterine brother in case a, is getting the same inheritance as that of uterine sister in case b.



(a) (b)

Fig. 8.7 Pie diagrams of a) case a and b) case b of example 8.4

Example 8.5: A woman dies and leaves the husband, mother, uterine brother and a uterine sister, how is her inheritance distributed?

Solution 8.5: Since the women does not leave any child:

- The husband=1/2
- The mother=1/6
- The uterine brother= 1/6
- The uterine sister = 1/6

The details are shown in Fig. 8.8

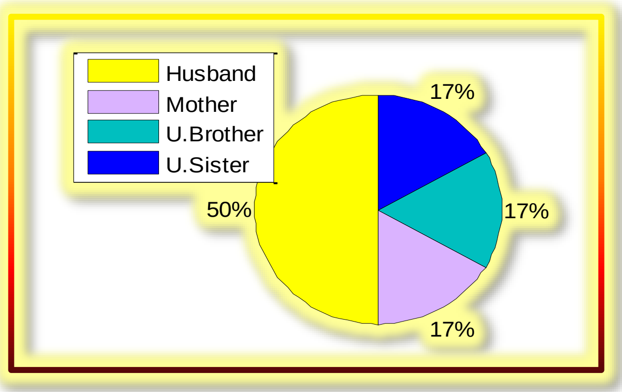


Fig. 8.8 Pie diagram of example 8.5

Note: These are few examples, in reality there are many such instances where a woman inherits equivalent to that of a man.

8.3.3 When a woman inherits more than that of a man

In many cases a woman inherits more than that of a man. Few examples are presented in this section.

Example 8.6: A woman leaves her husband, father, mother and two daughters along with 60 lakh of inheritance, then how the

inheritance is distributed. Explain if there are two sons instead of two daughters.

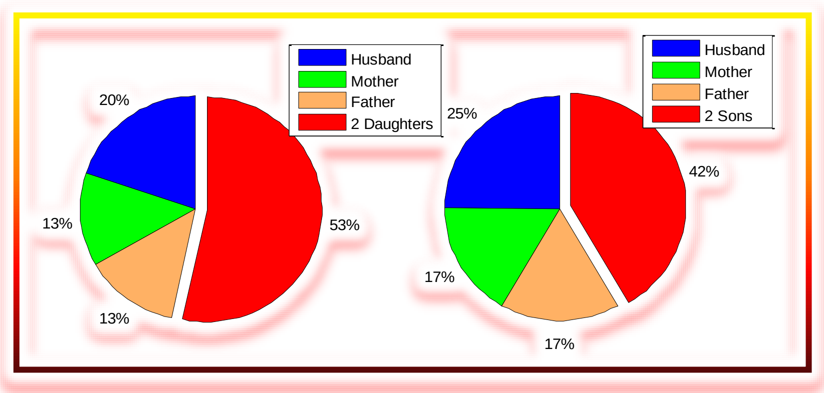
Solution 8.6: In case a, the sum is above unity, hence the doctrine of 'Awl' is applicable (Fig. 8.9).

Case a:

- The husband=1/4
- The mother=1/6
- The father=1/6
- Two daughters=2/3

Case b:

- The husband=1/4
- The mother=1/6
- The father=1/6
- Two sons=Residue



(a) (b)

Fig. 8.9 Pie diagrams for a) case a and b) case b of example 8.6

In case a, the two daughters inherit 32 lakh such that each gets 16 lakh. In case b, the sons inherit 25 lakh such that each gets 12.5 lakh.

Example 8.7: If a woman leaves her husband, mother and two sisters, and if the total assets are 48 lakh, then how the inheritance is distributed? In case there are two brothers, instead of sisters how the distribution gets affected.

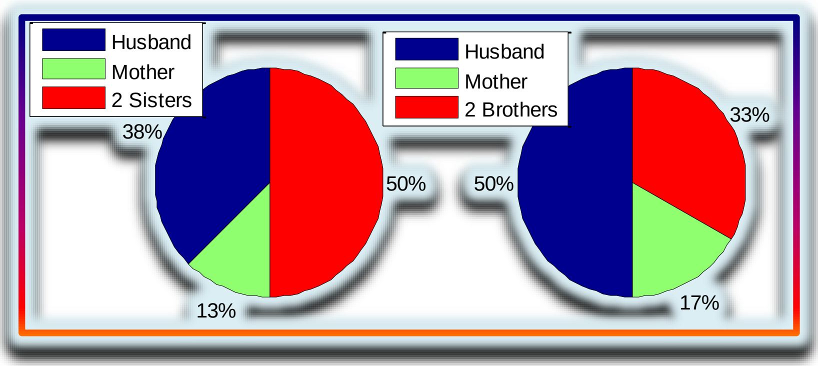
Solution 8.7: In case a, the doctrine of 'Awl' is implementable as the sum is above unity (Fig. 8.10).

Case a:

- The husband=1/2
- The mother=1/6
- Two sisters=2/3

Case b:

- The husband=1/2
- The mother=1/6
- Two brothers=Residue



(a) (b)

Fig. 8.10 Pie diagrams for a) case a and b) case b of example 8.7

In case a sisters inherit 24 lakh such that each gets 12 lakh. In case b, the brothers get 16 lakh, such that each gets 8 lakh.

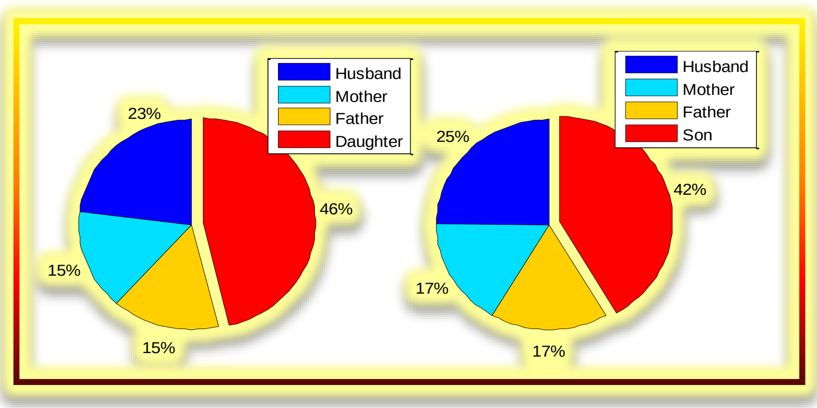
Note: In some cases, woman inherits 1/2 as sharer, whereas a man of equal level gets lesser as residuary.

Example 8.8: If a woman leaves her husband, father and mother and a daughter, and if the assets are of 1 crore and 56 lakh, explain the distribution. Also explain the distribution if there is a son instead of a daughter.

Solution 8.8: In case a, the doctrine of 'Awl' is applicable as the sum is more than unity (Fig. 8.11).

Case a:

- The husband=1/4
- The daughter=1/2
- The mother=1/6
- The father=1/6



(a) (b)

Fig.8.11 Pie diagrams of a) case a and case b) b of example 8.8

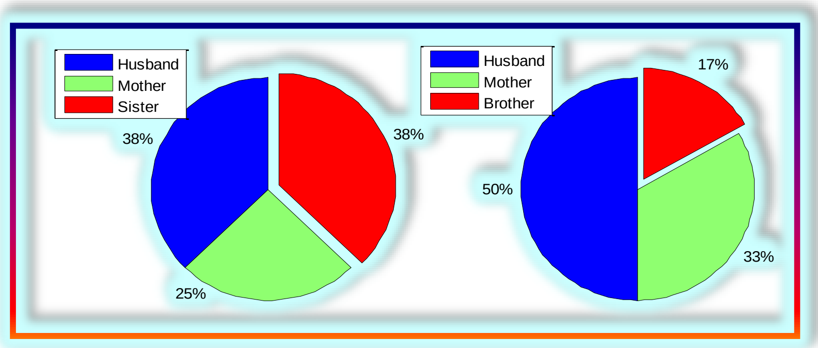
Case b:

- The husband =1/4
- The mother=1/6
- The father:1/6
- The son=Residue

The daughter inherits 72 lakh in case a. In case b, the son would inherit 65 lakh.

Example 8.9: If a woman leaves her husband, mother and a sister, and if her assets are of 48 lakh, explain the distribution. Also, explain the distribution if a brother is there instead of a sister.

Solution 8.9: In case a, the sum is above unity, hence the doctrine of 'Awl' is applicable (Fig. 8.12).



(a) (b)

Fig. 8.12 Pie diagrams a) case a and b) case b of example 8.9

Case a:

- The husband =1/2
- The mother= 1/3
- The sister= 1/2

Case b:

- The husband=1/2
- The mother=1/3
- The brother=Residue

The sister inherits 18 lakh in case a. In case b brother would inherit 8 lakh.

Note: Some times 1/6 share of a woman crosses the share of a man of equal level. For instance, share of a uterine sister is fixed as 1/6.

Example 8.10: If a woman leaves her husband, mother, uterine sister and two own brothers and if the woman leaves 60 lakh, then explain the distribution of assets.

Solution 8.10:

Fig. 8.13 shows the details of the distribution. The percentages are rounded off.

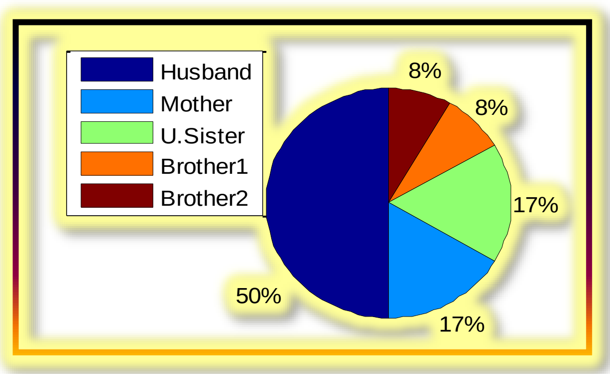


Fig. 8.13 Pie diagram of example 8.10

- The husband=1/2
- The mother=1/6
- The uterine sister=1/6
- Two brothers=Residue (=1/6)
- Hence, one brother=1/6 *1/2

The uterine sister inherits 10 lakh and brothers get 10 lakh together, such that each gets 5 lakh.

8.3.4 When a woman inherits but not a man of equal level

In some cases, a woman inherits but not a man of equal level. Few examples are given in this section.

Example 8.11: If a woman leaves her husband, father, mother, daughter and a granddaughter, then explain the distribution. If a grandson would have been there instead of the granddaughter then what he would have inherited.

Solution 8.11: Case a and b both have got their sum more than unity, hence the doctrine of 'Awl' is applicable.

Prophet Mohammad (PBUH) said if there is a granddaughter along with the only daughter. Then the granddaughter should be given 1/6 and the daughter 1/2 so that their total asset becomes 2/3 (Case a). If there is a grandson instead of a granddaughter this rule is not applicable, hence the grandson is hidden (Case b).

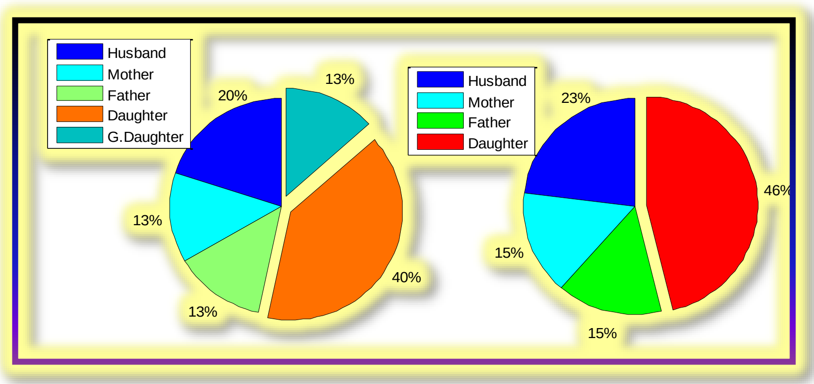
Case a:

- The husband=1/4
- The mother=1/6
- The father=1/6
- The daughter=1/2
- The granddaughter (As 'Asabah-Ma-Ghairihi') =1/6

Case b:

- The husband=1/4
- The mother=1/6
- The father=1/6
- The daughter=1/2
- The grandson=Nil (as he is hidden)

In Fig. 8.14 details shown are of both the cases. The pie diagram of case a is showing inheritance of the granddaughter, whereas, the pie diagram of case b is not showing any inheritance for the grandson.



(a) (b)

Fig. 8.14 Pie diagrams for a) case a and b) case b of example 8.11

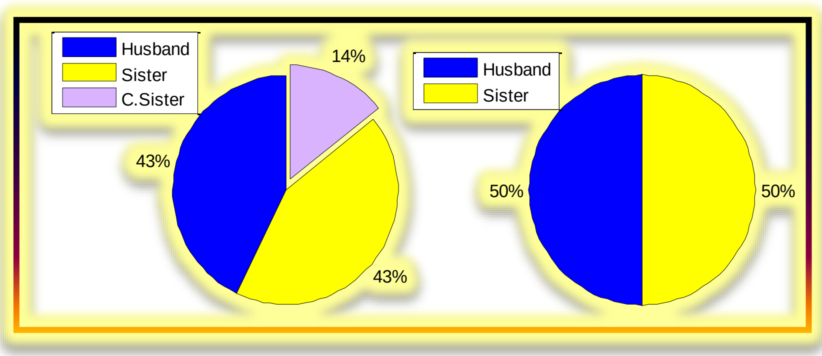
Example 8.12: A woman leaves husband, full sister and a consanguine sister, and then the consanguine sister inherits what? If a consanguine brother would have been there instead of a consanguine sister, then he would inherit how much?

Solution 8.12: In case a, the sum is above unity, hence the doctrine of 'Awl' is applicable.

Case a: The full sister forms 'Asabah Ma-Ghairihi' along with the consanguine sister, hence the full sister inherits 1/2 and the consanguine sister inherits 1/6 to complete 2/3 of women (As per a tradition of Prophet Mohammad (PBUH)).

- Husband = 1/2
- Sister=1/2
- Consanguine sister= 1/6

Case b: In case a consanguine brother is present instead of a consanguine sister, he cannot form 'Asabah-Ma-Ghairihi' with the full sister of the deceased. Hence, he is hidden and does not inherit. Details are shown in Fig. 8.15 for both the cases.



(a) (b)

Fig. 8.15 Pie diagrams for a) case a and b) case b of example 8.12

Note: There are many more cases were a woman inherits but not a man of equal level.

8.4 WOMEN'S SHARE IS LESS. WHEN AND WHY?

There is no doubt that among the heirs who inherit in all situations (called as primary heirs), men (father, husband and son) inherit more than that of women (mother, wife and daughter). This

difference is not because of the gender, but because of the financial responsibilities. A person who is given more financial responsibilities shall be given more financial support. This rule is drafted by a Hadith of Prophet Mohammad (PBUH), the summary of which is that the person who has to bear the loss shall be the one to gain the profit (Abu-Dawood, kitab-ul-Ajarah, H.No: 3508; Tirmizi, H.No. 1285).

From this viewpoint, if inheritance of men is compared with that of women, then it is obvious that the financial responsibilities of men are at extreme when compared to that of women. A man has to take care of himself, his wife, children, and parents and sometimes even brothers and sisters. If the wife refuses to feed his children, then he has to arrange another woman for this purpose through payment. In case of son's death a man has to provide maintenance to the grandchildren.

A woman is totally independent of the financial responsibilities. For her maintenance itself, a man is responsible. From this point of view, a woman is not supposed to get any share in inheritance, but because of her physical weakness, Islam tries to protect her financially. The same rule can be understood with one more example. In Islam the respect and dignity of parents is much more than that of children, even then the proportion in inheritance is more for children than that of the parents. This is because the parents are closing their chapter of responsibilities and the children have to open this chapter. Hence, it is concluded that the law of inheritance has its root in the law of maintenance and the financial responsibilities. The person with more responsibilities has more share in inheritance, the person with less responsibility has less share in inheritance.